113—293

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 946.

MRS. WIDOW BERNARD AVEGNO, TUTRIX OF HER MINOR CHILDREN, ALBERT AVEGNO AND PIERRE AVEGNO; BERNARD AVEGNO JUNIOR; LUCIE AVEGNO, WIFE OF WILLIAM VOORHIES, AND MARIE AVEGNO, WIFE OF LEANDRE LEROY, PLAINTIFFS IN ERROR,

vs.

WILLIAM B. SCHMIDT AND FRANCIS M. ZIEGLER, AND THE SUCCESSION OF CHARLES MORGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED SEPTEMBER 20, 1884.

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1 *Petition. Filed* 31*st Dec.*, 1879.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

Widow B. AVEGNO, Tutrix, & *als.*
vs.
SCHMIDT & ZIEGLER. } No. 1996.

To the hon. the judge of the fifth district court for the parish of Orleans:

The petition of Mrs. Widow Bernard Avengo, tutrix of her minor children, Albert Avegno and Pierre Avegno, of Bernard Avegno, Jr., of Lucie Avegno, wife of Wm. Voorhies, herein assisted and authorized by her husband, and of Marie Avegno, of Paris, France, wife of Doctor Leandre Leroy, of Paris, France, herein
2 assisted and authorized by her said husband, all of New Orleans, excepting said Marie Avegno, wife of Dr. L. Leroy, with respect represents that they are the owners of the following property, to wit:

Four (4) lots of ground, with the buildings thereon, rights, ways, privileges, and appurtenances thereunto belonging, situate in the first (1st) district of this city, in the square bounded by New Levee, Fulton, Gravier, and Poydras streets, and designated by the Nos. nine, ten, eleven, & twelve, on a plan by Hugh Grant, surveyor, dated 12th January, 1852, and deposited in the office of H. B. Cenas, late notary in this city, lot No. nine having twenty-four feet six inches and three lines front on New Levee street; twenty-two feet eight inches front on Fulton street, by a depth of one hundred and eighteen feet seven inches and two lines on the side of lot No. eight, and
3 of one hundred and eighteen feet and five lines on the side of lot No. 10; lot No. ten having twenty-four feet six inches and three lines front on New Levee street, twenty-four feet eight inches and five lines front on Fulton street, by a depth of one hundred and eighteen feet and five lines on the side of lot No. nine, and of one hundred and seventeen feet six inches and three lines on the side of lot No. eleven; lot No. eleven having twenty-four feet six inches and three lines front on New Levee street, twenty-two feet eight inches and five lines front on Fulton street, by a depth of one hundred and seventeen feet six inches and three lines on the side of lot No. ten, and of one hundred and sixteen feet eleven inches and three lines on the side of lot No. twelve; and lot No. twelve having twenty-four feet six inches and two lines front on New Levee street, twenty-two feet eight inches and five lines front
4 on Fulton street, by a depth of one hundred and sixteen feet eleven inches and three lines on the side of lot No. eleven, and of one hundred and sixteen feet four inches and six lines on the side of lot No. thirteen.

That on the 20th day of January, 1865, and for several years previous, the said property belonged in full ownership to Bernard Avegno, now deceased, the father of petitioner, he having pur-

chased the some on the 23rd day of February, 1860, from the estates of Laborde and Xiques, as will more fully appear by the Exhibit "A," annexed as a part hereof, being judicial sale of said property.

That on said 20th day of January, 1865, the Government of the United States instituted proceedings for the forfeiture and confiscation of said property of Bernard Avegno, in the United States district court of Louisiana, as will more fully appear by reference to record of United States *vs.* Seven Lots, the property of Bernard Avegno, No. 7972 of the docket of said court that said proceedings were carried on under the provisions of the act of Congress of July 17th, 1862, passed "to suppress insurrection and rebellion, to seize and confiscate the property of rebels, etc."

That said proceedings were regularly prosecuted, and said property was condemned and declared forfeited to the Government of the United States; that thereupon, 13th April, 1865, Charles Morgan filed an intervention and third opposition, claiming to be a mortgage creditor of said Bernard Avegno on the above-described property, and other parties filed interventions and third oppositions claiming to be creditors also, but with mortgage on other properties than the one herein described; that said interventions and third oppositions were duly tried in the usual course of proceedings, and that the aforesaid claim of Charles Morgan was invalidated and rejected by a final decree and judgment of said United States district court. Whereupon the said Charles Morgan caused the same to be removed by appeal to the U. S. circuit court, in which said appeal was dismissed, and this judgment of this circuit court being removed on appeal to the U. S. Supreme Court, the same was there finally affirmed. That although said mortgage claim had been rejected, the said Charles Morgan proceeded, on June 25th, 1867, in the circuit court of the United States for the 5th district, at New Orleans, to the foreclosure of said mortgage in the matter of Charles Morgan *vs.* Bernard Avegno, No. 5279 of said court; that although said defendant had been divested of all interest whatever in said property by a final decree of condemnation and confiscation, as aforesaid, he was made the party defendant in his own right, and said proceedings were carried on exclusively between himself and said Charles Morgan; that under the decree of foreclosure said property was advertized for sale, and was sold by the United States marshal, and by him adjudicated to the said Charles Morgan on the 21st day of December, 1868; that on the 1st day of March, 1869, the said Charles Morgan sold the same property to William B. Schmidt and Francis M. Ziegler, of New Orleans, who have been since and are in possession of the same.

Petitioners further aver that by reason of said confiscation and forfeiture all right, title, interest, and ownership of said Bernard Avegno (dec'd) was absolutely divested; that said real estate was, during his lifetime, forfeited to the United States, but that the naked ownership thereof was then vested in your petitioners, who were his legitimate children, living at the time of rendition of said decree and judgment of condemnation and forfeiture.

That on the 12th day of August, 1872, Bernard Avegno died in the city of New Orleans, whereupon the title and interest of the United States in the said property came to an end and said life estate was terminated, your petitioners being therefore entitled to the full ownership of said property.

That the rents, revenues, enjoyment, and occupancy of said premises since the date of the demise of said Bernard Avegno, up to the present time and during the continuance of these proceedings, have been, are still, and will be worth the yearly sum of five thousand dollars ($5,000.00), which said William B. Schmidt and Francis M. Ziegler are in law and equity bound to pay over to petitioners.

9 That notwithstanding amicable demand said parties have refused to deliver said property to petitioners and to pay them said rents and revenues. Wherefore petitioners pray that William B. Schmidt and Francis M. Ziegler be cited; that there be judgment against the latter in favor of the former; that petitioners be recognized as the owners of the property described herein, and that said William B. Schmidt & Francis M. Ziegler be condemned to pay to petitioners the yearly sum of five thousand dollars from the 12th day of August, 1872, and during the pendency of this suit, and costs, to be taxed, etc.

Pray for general relief; and, as in duty bound, etc.

(Signed) E. BERMUDEZ,
Of Counsel.

10 *Answer. Filed Feb'y 7th*, 1880.

Mrs. BERNARD AVEGNO, Tutrix, &c., *vs.* SCHMIDT & ZIEGLER. } No. 1996.

Now Come William B. Schmidt and Francis M. Ziegler, the defendants herein, and for answer to plaintiff's petition deny all and singular the allegations therein contained, except so far as may be hereinafter specially admitted.

Further answering, these defendants admit that Bernard Avegno was the owner of the property for the recovery of which the suit is brought.

Defendants aver that on the (3rd) third of August, 1862, the said Bernard Avegno executed a special mortgage upon said property to secure the payment of six (6) promissory notes, dated April 3d, 1862, to the order of and endorsed by said Avegno, and represent-

11 ing his indebtedness to Isham G. Harris, aggregating thirty-six thousand four hundred dollars ($36,400), three of said promissory notes being for ten thousand eight hundred and thirty-three and 33⅓-100 dollars ($10,833 33⅓-100), payable, respectively, in one, two, and three years after date, one of said notes being for nineteen hundred and fifty dollars ($1,950), payable in three years after date; one of said notes being for thirteen hundred dollars ($1,300), payable in two years after date, and one of said notes being for six hundred and fifty dollars ($650), payable one year after date,

said mortgage being favor of said Harris, or any future holder of said notes; and said notes were executed and delivered by said Avegno to said Isham G. Harris, and thereafter were acquired by Charles Morgan, and copy of said act of mortgage passed
12 April 3d, 1862, before S. Mayer, notary public, is herewith filed and made part hereof.

Defendants further show that said Charles Morgan on June 25th, 1867, being a citizen of the State of New York, instituted in the circuit court of the United States for the fifth circuit and district of Louisiana judicial proceedings against said Bernard Avegno, a citizen of the State of Louisiana, to enforce the payment of said notes, and the mortgage to secure the same; that in said suit judgment was rendered against said Avegno for the amount of said mortgage debt with recognition of said special mortgage to secure the payment of said debt, under which judgment said property was seized, sold, and adjudicated to said Morgan for the sum of fifty thousand dollars ($50,000.00), less costs, which was paid by said Morgan, and all
13 the proceeds of which were applied in partial satisfaction of said mortgage debt of said Avegno, as appears by the act of sale of said marshal to said Morgan, and the said marshal's return; copies thereof are made part hereof, and are specially referred to for fuller explanation and greater certainty.

Defendants further show that the aforesaid act of mortgage sued upon in said suit of Charles Morgan *vs.* Bernard Avegno contained the fact or stipulation *de non alienand-s*, under which the mortgage creditor had the right to proceed against the property and against said Avegno, for the payment of his debt, and to treat said Avegno as the debtor, and the defendant, in any proceeding instituted to enforce payment of said mortgage debt irrespective of any change in the condition of said Avegno, and irrespective of any attempted alienation, or change of title to said property, which
14 alienation and change, by whatever mode attempted, were void and of no effect, so far as regards said Morgan and his right to enforce said mortgage against said Avegno as party defendant; that in said suit said Avegno was regularly cited, and all the formalities and legal requisites were fulfilled, and said proceedings were legal and valid in all respects by the effect whereof said Morgan became the owner of said property, all of which more fully appears by the record of said suit No. 5279, of the docket of said circuit court, and to said marshal's deed. These defendants deny that in the alleged confiscation proceedings of The United States *vs.* Seven (7) Lots of Ground, No. 7972, of the United States district court for the district of Louisina, based upon the statute of July 17th, 1862, the property sued for in this suit was ever seized or
15 taken possession of by the United States or its officers or sold in pursuance of any decree in said proceedings; but on the contrary, these defendants aver that no such seizure or taking possession was ever effected, nor was the defendant Avegno ever cited or in any manner brought into court in said proceedings, nor was any such decree rendered or sale made; but the possession of said Avegno as owner of the said property was never disturbed, and said proceedings

were wholly void and ineffective, so far as regards the rights of said Morgan as a mortgage creditor as aforesaid. Defendants specially deny that the district court of the United States had any jurisdiction to pass on or dispose of this demand of said Morgan as the mortgage creditor of said Avegno to seize and sell said property to pay said notes, nor was any such issue ever submitted to or passed on by said district court of the United States. Defendants aver that the jurisdiction of said
16 district court of the United States extended only to seize and sell the life interest and estate of said Avegno in said property, subject to said mortgage by him granted upon said property; and had said confiscation proceedings been consummated by a seizure of said property accompanied with citation on the defendant therein, said mortgage still have attached to said property, with the right of said Morgan to enforce the mortgage by direct proceedings against said Avegno; that, moreover, the judgment on the intervention of said Morgan in said proceedings was one of non-suit merely, and whatever the form of the judgment from the nature of the jurisdiction, such judgment could have had no effect whatever to control or impair in any way the mortgage rights of said Morgan upon said property and his right to have said property seized
17 and sold for the payment of said notes held by him.

And these defendants further show that said confiscation proceedings of the United States, not accompanied with any citation of any kind to said Avegno, and never consummated by any seizure or sale of the property in question, and void for all purposes, because no such seizure was ever made, were wholly superceded by the pardon of said Avegno by the amnesty proclamation of the President of the United States, September 25, 1868, for all offenses charged against him in said proceedings, so that even if the mortgage rights of said Morgan could have been affected by said confiscation proceedings if consummated by a seizure and sale of said property, which is denied, the said proceedings were superseded and and became ineffective for any purpose, by reason of said pardon.

And these defendants aver that on the 12th March, 1869, they
18 acquired said property from said Charles Morgan for the price and sum of fifty thousand dollars, which has been paid by them; and they herewith file as part hereof the act of sale of said Morgan to them, of date 12 M'ch, 1869, before E. Barnett, N. P.; that they have been in possession of said property ever since said sale as owners under said title, which they aver to be a legal and valid title in all respects. Defendants show that they have paid taxes on said property since their said acquisition of title, and have paid other charges for the preservation of said property, as set forth in the exhibit herewith filed and marked A; that they have also made useful and valuable improvements upon said property, as set forth in said statement; and if the plaintiffs have any title to said property, which is denied, they cannot recover without paying and reimbursing to these defendants the amount of their said taxes,
19 charges, and improvements set forth in said statement, amounting to forty-seven thousand three hundred and forty-four $\frac{11}{100}$ dollars ($47,344.11.)

And these defendants further show that if plaintiffs were entitled to recover said property, which is denied, they could not recover the same except subject to said mortgage debt of said — for thirty-six thousand six hundred & forty dollars, with 8 per cent. interest from dates of said mortgage notes, created by said Avegno by said act of mortgage of April 3, 1862, and under which said property was sold by said Morgan in his said suit against said Avegno, the proceeds of said sale having been applied to pay said mortgage debt, and in the event of said recovery these defendants subrogated to all the rights of said Morgan, would be entitled to have said mortgage reinstated, decreed to be valid and made effective against said property and against said plaintiffs.

20 And these defendants show that the said sale to them was made with full and express warranty of title, and if the plaintiffs are entitled to any judgment against them, which is denied, these defendants are entitled to similar judgment over and against their said warrantor, Charles Morgan; that said Morgan has departed this life, and that Mary Jane Morgan is his testamentary executrix, duly qualified. And these defendants further show that in the event of the plaintiffs recovering judgment against them, the right to which is denied, defendants would be further entitled to judgment against said estate and heirs of Charles Morgan for the aforesaid price paid by defendants for said property, to wit, fifty thousand dollars ($50,000.00), with (8 per ct.) eight per cent. interest from the date of said purchase.

21 And these defendants show that the title of Charles Morgan, herein set forth, and under which they hold, being derived from a sale made by the United States marshal under the process of the United States circuit court for the fifth circuit and district of Louisiana, that said title is protected by the Constitution and laws of the United States; and these defendants, holding title by and through the deed of said Charles Morgan, they are subrogated to all the rights of said Morgan, and said title is also protected in the same manner by the Constitution and laws of the United States, the full protection of which they claim and insist upon.

Wherefore these defendants pray for judgment in their favor and against the plaintiffs, and recognizing the defendants to be lawful owners of said property, but if any judgment should be rendered in favor of plaintiffs, which defendants insist cannot be, defendants pray that said mortgage debt be reinstated and decreed to

22 be a valid mortgage upon said property, and effective against the plaintiffs herein, and that the plaintiffs be condemned to pay to the defendants the aforesaid amount of forty-seven thousand three hundred and forty-four $\frac{11}{100}$ dollars, with legal interest, the amount of the charges paid, and the valuable improvements made by defendants since their purchase, with interest, and that said payment be decreed to be made to defendants by plaintiffs before plaintiffs can obtain possession of said property; and defendants further pray that said succession of Charles Morgan, his heirs and his executrix, be cited as in warranty to defend this suit, and that if judgment be rendered in favor of plaintiffs and against these defendants,

that like judgment be rendered in favor of these defendants and against said warrantors, and that in the event of any judg-
23 ment against these defendants' said estate of Charles Morgan be further condemned to pay to these defendants the amount of said charges, improvements, and expenses on said property, and the further sum of fifty thousand dollars ($50,000.00), with (8 per ct.) interest from March, 1869, and for general relief.

(Signed) HENRY C. MILLER,
" BRANCH K. MILLER,
Of Counsel.

Order.

Let this answer and call in warranty be filed as prayed for and according to law.

New Orleans, February 7th, 1880.

Signed Feb'y 15th for Feb'y 7th, 1880.

(Signed) W. H. ROGERS, *Judge.*

24 *Answer of Mrs. Morgan, Executrix, &c., Warrantor. Filed April 19th*, 1881.

Widow BERNARD AVEGNO, Tutrix, etc., *vs.* SCHMIDT & ZIEGLER. } No. 1996.

Now into this honorable court, through her undersigned attorneys, comes Mistress Mary Jane Morgan, widow of said late Charles Morgan, and duly qualified executrix of his succession, which said succession has been called in warranty in this suit by the defendants herein, and, first answering the petition of plaintiffs herein, your respondent says: That she denies all and singular the allegation contained in said petition, except in so far as hereinafter admitted. And, further answering, respondent adopts as her own the already herein filed answer of defendants to said petition, and she de-
25 clares to be true and correct the allegations contained in said answer showing how the late Charles Morgan acquired title to the property herein sued for by plaintiffs, and how he transferred the same to defendants herein. For all dates, sums, and other necessary particulars your respondent refers to defendants' said answer and the annexes thereto, and your respondent avers that the title of said late Charles Morgan to the real estate herein sued for was valid and perfect in every respect, and was so transferred to the defendants herein. Your respondent further avers by reason of the defects and irregularities pointed out in defendants' said answer, the confiscation proceedings mentioned in plaintiffs' petition, and in defendants' said answer were utterly void and of no effect, and did not divest the confiscatee therein, Bernard Avegno, the author of plaintiffs' title herein, of his title to the prop-
26 erty herein sued for, and for this reason, as well as in virtue of the fact *de non alienando* in the act of mortgage whereunder the said late Charles Morgan foreclosed all as fully stated in said answer to defendants, the said foreclosure was valid and regular,

and wholly divested said Bernard Avegno of his title to said property and vested the full, absolute, and entire title thereto in said late Charles Morgan.

But if this honorable court should consider that the plaintiffs herein are entitled to recover the property herein sued for, then respondent avers that the mortgage held by said late Charles Morgan on said property set forth in respondents' said answer should be decreed to revive in favor of the succession of said Charles Morgan and to attach to said property and be binding on the same; and

27 that there s-ould also be judgment in favor of defendants herein and against plaintiffs, condemning said plaintiffs to pay to said defendants all sums expended by said defendants in repairs and improvements on said property and for taxes thereon, the sums so expended being fully shown in the exhibits annexed to defendants' said answer, and that defendants should be decreed to be entitled to retain said property until said sums shall have been reimbursed to them by said plaintiffs.

And further answering, respondent denies that the defendants herein have any claim whatever in any event against respondent or against the succession of said Charles Morgan.

Wherefore, the premises considered, your respondent prays that plaintiffs' demand be rejected at their costs, and that the defendants herein be quieted in their title to the property herein sued for by plaintiffs.

Further prays, that if this honorable court consider that

28 the plaintiffs herein are entitled to recover the property herein sued for by them, then there be judgment in favor of your respondent, decreeing that the mortgage of April 3rd, 1862, held by said late Charles Morgan on the said property, be decreed to revive and attach in full force to said property; and that the said plaintiffs be decreed to pay and reimburse to said defendants the sums expended by said defendants in necessary repairs and for improvements on said property and for taxes thereon; all as detailed and summed up in the exhibits annexed to defendants' answer herein. Further prays that all defendants' demands against respondent and against the estate of said late Charles Morgan be rejected. Further prays for all general relief.

(Signed) LEOVY & KRUTTSCHNITT,
Att'ys for Mrs. Morgan, Executrix, &c.

29 *Admissions as to Morgan's Heirs. Filed May 11th,* 1881.

It is admitted that Charles Morgan died in 1878, subsequent to the date of his sale to the defendants Schmidt & Ziegler; that his widow inherits one-third of all his estate under his will duly admitted to probate, and that she has accepted his succession; that his other heirs, also accepting his succ'n, are Mrs. Charles A. Whitney, Mrs. George Quintard, Richard Morgan, the descendants of Henry Morgan, the descendants of Mrs. I. C. Harris, all of whom reside in New York, except Mrs. Whitney, and as to all the warrantors, except

Mrs. Morgan, it is agreed that def'ts' rights be reserved in the event of any judg't being rendered in favor of pl't'ffs.

(Signed) H. C. M.
" H. J. L.

30 *Reasons for Judgment. Filed June 22nd,* 1882.

Heirs of B. AVEGNO
vs.
SCHMIDT & ZIEGLER. } No. 1996.

Without enquiring into the validity and regularity of the confiscation proceedings brought into controversy in this case, granting that they were such as to completely divest Bernard Avegno of his title to the property in dispute, granting that their effect was to constitute the naked ownership of the property in his heirs in whom it remained at the date of the commencement & end of Morgan's proceedings to execute his mortgage, was the sale under those hypothecary proceedings such as to give a valid title to the purchaser?

I think it was.

The mortgage contained the part not to sell.

That agreement was binding upon him and his heirs. The
31 Government & his creditors acting through the courts might ignore it, but neither he nor his heirs could ignore it. He bound himself never to alienate that property until the mortgage claim was satisfied. The plaintiffs who claim the property by virtue of no other right than the transmission to them of whatever estate he possessed, whether at the date of his death or prior to the proceedings in confiscation, cannot claim any greater rights than he had.

He had no right—he never had any right (from the point of view under consideration)—to sell the property in dispute after he had executed the mortgage.

If he had sold it the sale would have been a nullity (for Morgan) as regards himself and his heirs.

If the sale was made against his will his obligation not to sell was none the less binding upon him and his heirs and *quoad*
32 them, it can be considered as not made.

The only claim of plaintiffs upon this property is that resulting from heirship. Now they cannot in the same breath claim to be Avegno's heirs and repudiate his obligations to keep and retain the property until the mortgage was satisfied.

The case of French *vs.* Wade & others, of which it is the sequence, are invoked. What do those cases settle? Nothing excepting that the man whose title to property has been taken away cannot sell it. Wade's property had been confiscated. He bought at marshal's sale all that had been confiscated, to wit, the life estate. He acquired nothing more; he could sell nothing more.

At the time Avegno made the pact *de non alienando* he was absolute master of his property. He had a right to make the pact and it was binding upon his heirs. It created a *vinculium juris*
33 which is so inextricably interwoven with the cord which

unites the plaintiffs to their ancestor that they can only hold the latter by their own obligation in the former. So far as plaintiffs are concerned Bernard Aregno was, on the 25th of June, 1867, the absolute owner of the property in dispute, & so remained until his death in spite of the confiscation proceedings.

Had the mortgage been granted after the confiscation proceedings; had the pact *de non alienando* been superadded after those proceedings, they would have been absolutely null as to the whole world, including his heirs, for the obvious reason that as to the mortgaged property he was incapable of alienating or contracting after that date. The mortgage granted prior to that date was valid, together with the accompanying stipulation not to sell, the latter being entirely or partially nugatory *quoad* the Government
34 and the *quoad* courts, but vital and enduring as to himself and his heirs forever.

Judgment for def'd't.

Judgment.

W'dow B. AVEGNO, Tutrix, &c.,
vs.
WILLIAM B. SCHMIDT and FRANCIS M. ZIEGLER. } No. 1996.

In this case, heretofore submitted to the court, for the reasons assigned in the written opinion of the court this day delivered and filed, the law and evidence being in favor of defendants.

It is ordered, adjudged, and decreed that there be judgment in favor of said defendants, William B. Schmidt and Francis M. Ziegler, and against plaintiffs, Mrs. Widow Bernard Avegno, tutrix of her minor children, Albert Avegno and Pierre Avegno, and against Lucie Avegno, wife of William Voorhies, Marie Avegno, wife
35 of Dr. Leandre Leroy, and Bernard Avegno, Jr., rejecting said plaintiffs' demand with costs of suit, and recognizing the said defendants, William B. Schmidt and Francis M. Ziegler, to be the lawful owners of the property herein sued for and fully described in plaintiffs' petition on file herein.

Judgment rendered June 22nd, 1881.

Judgment signed June 27th, 1881.

(Signed) N. H. RIGHTOR, *Judge.*

36 *Note of Evidence for Pl'ff. Filed May 3rd*, 1881.

Heirs of B. AVEGNO
vs.
SCHMIDT & ZIEGLER. } No. 1996.

It is admitted that Bernard Avegno died in New Orleans on the 12th of August, 1872, and that on the 20th of January, 1865, the plaintiffs were the legal heirs of said Bernard Avegno, issue of his marriage with Chestine Durell, now widow of Bernard Avegno, and that said Bernard had no other children or legal heirs.

It is admitted that Bernard Avegno was the owner of the prop-

erty in question, having acquired the same, as stated in the petition, on the 23d of February, 1860.

Plaintiff offers in evidence transcript of record No. 3651 of the United States circuit court, entitled The United States *vs.* Seven Lots of Ground, the property of Bernard Avegno, the same
37 being offered in lieu of the original record of the United States district court, from which this appeal was taken.

Plaintiffs offer in evidence extract from the minutes of the United States circuit court of the April term, of 1875, dated Wednesday, the 12th of May, marked E. M. Plaintiffs offer in evidence the monition and marshal's return thereon of February 14th, 1865, in the case of The United States *vs.* Seven Lots of Ground, No. 7972, marked M. M.

It is agreed that any portion of the judicial records relied upon that either party may desire may be offered by either party by supplemental offer.

Note of Evidence on Behalf of Def'ts and Warrantors. Filed May 11th 1881.

Heirs of B. AVEGNO
vs.
SCHMIDT & ZIEGLER. } No. 1996.

On behalf of defendants and warrantors, counsel offers in
38 evidence the act of mortgage of B. Avegno to Ismael C. Harris, dated the 3rd of April, 1862, together with the six notes as exhibited by the copy in record No. 3651 of the U. S. circuit court; the act of transfer from Harris to Morgan of the mortgage and notes dated May 8th, 1864, contained also in said record No. 3651; the petition, the judgment, the execution, and marshal's return in suit No. 5279 of the U. S. circuit court, entitled Charles Morgan *vs.* B. Avegno; the marshal's deed to Charles Morgan of the property seized and sold in said suit; the act of sale by Charles Morgan to Schmidt & Ziegler before E. Barnet, notary, of the 12th of March, 1868; the citation, acceptance of petition, and waiver of citation in the suit of Charles Morgan *vs.* B. Avegno in the U. S. circuit court; also in suit No. 7972 of the United States district court, entitled The United States *vs.* Seven Lots of Ground, being
39 No. 3651 of the U. S. circuit court, and carried by appeal to the Supreme Court of the United States; the defendants offer in evidence the petition and order for appeal; the bond furnished by them or a copy of it, and the judgment of the Supreme Court of the United States; also petition order of appeal in the same case in the U. S. circuit court, and the bond of appeal furnished in the U. S. circuit court.

Defendants offer in evidence the testimony of W. B. Schmidt and others to support their allegations; that the property proceeded against in the confiscation proceedings was never seized or taken into custody by the marshal; that there never was any actual seizure and possession; the right being reserved to either side to object to said evidence and reserve bills of exception; also the testimony

of W. B. Schmidt and others, and two notices therein referred to, marked R. and S.; right of objection and bills of exception
40 reserved to either party to said testimony. It is admitted that the papers marked C C exhibits the decision of the Supreme Court of the United States, as well as the decision of the circuit court of the United States, in the case of The United States *vs.* Seven Lots of Ground on the appeal of Charles Morgan. Said paper marked C C is now filed.

It is admitted that Charles Morgan, the vendor of the defendant, departed this life prior to the institution of this suit, subsequent to the sale to the defendants; that his succession was opened in New York; that his widow named in the answer of the warrantor became heir as well as the executrix under the will: that is to say, she was heir to a part of the estate; that the estate has been accepted by her and by her coheirs,

As between the warrantor and the defendants it is agreed that there shall be proof offered or agreement made to show the
41 condition of the heirs of Ch's Morgan, of the proportion in which they are heirs. Said agreement is shown by the admission of death of Ch's Morgan, marked D D. The warrantors specially offer in evidence all the evidence offered by the defendants.

It is agreed that whenever the transcripts of records or copies produced contain any papers relied upon by either side, the said copies shall avail in lieu of the particular paper offered in evidence; and in the event of appeal, only such portions of the record shall be copied as the parties may agree upon.

It is further agreed that any portion of the judicial records relied upon that either party may desire, may be offered by either party by supplemental offer.

42 *Testimony. Filed May* 11*th*, 1881.

HEIRS OF B. AVEGNO
vs.
SCHMIDT & ZIEGLER. } No. 1996.

Testimony on behalf of defendants and warrantors taken by consent, May 11th, 1881.

Present: A. Voorhies, for plaintiffs; H. C. Miller, for defendants; H. J. Leovy, for warrantors.

OCTAVE V. FERNANDEZ, sworn on behalf of defendants and warrantors.

Examination-in-chief by Mr. MILLER:

Q. Were you in the employ of Schmidt & Ziegler in 1866, and from that year?

A. Yes.

Q. And up to what period?

A. To December 31st, 1879.

Q. Do you know the premises sued for and occupied by Schmidt & Ziegler?

A. Yes.

Q. When you went into their employment in the fall of 1866, were they in that store carrying on their business?

43 A. I was with them when they were carrying on business in that store; I was with them before, and we moved into that store in 1866.

Q. At the time when Schmidt & Ziegler took possession of the premises sued for in this case in the fall of 1866, and at any time subsequent, was there or not any seizure of that property by the United States marshal, in the case of the United States *vs.* Seven Lots of Ground, the confiscation proceedings?

A. No, sir.

Q. Neither at 1866, or at any time subsequent, was there any keeper put there by the United States marshal?

A. No.

Q. In 1866, or at any time subsequent, was there any demand made upon Schmidt & Ziegler to pay rent to the United States marshal for those premises?

A. It was the year afterwards; during the second year an order was received from the court to stop payment of rent.

44 Q. Was not that order issued in the suit of Charles Morgan?

A. Yes: in the suit of Charles Morgan *vs.* B. Avegno.

Q. With that exception there was no interference in the payment of rents?

A. No; the rent was paid in advance for one year, $6,500, before they moved into the store.

Q. Then from 1866 and thereafter Schmidt & Ziegler paid the rent of that store to Bernard Avegno, and afterwards to Charles Morgan?

A. Yes; it is admitted that the rents of real estate in New Orleans in the years from 1866 to 1872 were higher than rents have been at any time since that date, and that since 1872 the average decline during the several years up to the present time has been about thirty per cent., and that in some localities there has been a greater decline.

Q. Are you familiar with the rents in this particular locality?

A. Yes; I own property myself right opposite.

45 Q. Has there been any decline in rents of stores in that locality since the year 1872; if yea, state what the decline has been in that particular locality.

A. I think the decline has been fifty per cent.

Q. You have had some opportunity of knowing the rents paid in that locality since 1872?

A. I heard from hearsay.

Q. You say you also own property in that neighborhood yourself?

A. Yes.

Q. And I suppose the property you own you have usually leased to others?

A. Yes, sir.

Q. You speak therefore to some extent from your own personal knowledge?

A. Yes.

Cross-examined by Mr. VOORHIES:

Q. You don't pretend to say that every property in that neighborhood has fallen one-half in rents since 1872?

A. No; I don't mean all property there.

46 Q. Some has fallen fifty per cent. and some not?

A. Yes.

Q. You know the premises where Schmidt & Ziegler's place of business is?

A. Yes.

Q. You say that property there in good order has fallen fifty per cent. in value?

A. Yes.

Q. I mean in rents?

A. Yes; in rent.

Q. What would be the value of the rent of those premises occupied by Schmidt & Ziegler now since 1872?

A. I suppose three thousand dollars a year; from $3,000 to 3,500 a year.

Testimony. Filed May 11th, 1881.

Mrs. B. AVEGNO, Tutrix, etc., *vs.* SCHMIDT & ZIEGLER. } No. 1996.

Testimony taken by consent on behalf of defendants & warrantors, subject to all legal objections, except as to manner, form, and time of taking.

MAY 10TH, 1881.

47 Appearances: Hon. Albert Voorhies, attorney for plaintiffs; H. C. Miller, Esq., attorney for defendants; H. J. Leovy, Esq., attorney for warrantors.

W. B. SCHMIDT sworn for defendants and warrantors:

Direct examination by Mr. MILLER:

Q. Mr. Schmidt, you are a member of the firm of Schmidt & Zeigler, the defendants in this case?

A. Yes, sir.

Q. The firm of Schmidt & Ziegler was in existence at and prior to 1865?

A. It was in existence.

Q. At and prior to 1865?

A. Yes, sir.

Q. You were the lessees of that store at one time, were you not?

A. Yes, sir.

Q. From whom did you lease?

A. From Bernard Avegno.

Q. Do you recollect when your lease from Avegno commenced?

A. It commenced on the first of October, 1866.

48 Q. Now, sir, up to what period did your lease from Avegno continue?

A. I took it then for one year.

Q. Up to what period did it continue?

A. Up to the first of October, 1867; 1st of October, 1866, to 1st October, 1867, one year.

Q. You afterwards became the owner?

A. Yes, sir; later on.

Q. The firm of Schmidt & Ziegler became the owners of the property?

A. Yes, sir.

Q. That was in March, '68?

A. We purchased the property in March, 1869; 1st of March, '69.

Q. Then your lease from Avegno continued up to the time of your purchase?

A. Well, I rented it for two years from Avegno. The first year was from the 1st of October, 1866. That was the first year.

Q. Then what took place?

A. Then I rented again. I took another lease for another year, from the 1st of October, '67, to the 1st of October, 1868. The first year I paid him $6,500 in cash. The second year, on October
49 23rd, 1867, the firm gave him four notes, each for $1,625, payable quarterly, for one year's rent, the same rent still. I gave him four notes for the rent.

Q. In point of fact, you leased the store from Bernard Avegno at $6,500 a year?

A. Yes, sir.

Q. You rented first in October, '66, and your lease continued for two years?

A. Yes, sir.

Q. That brought you to October, 1868?

A. Yes, sir. I bought the property from Charles Morgan on the 1st March, '69.

Q. That terminated your lease, of course?

A. I then owned it.

Q. During a part of the period of your lease, prior to your purchase from Morgan, you paid the rent to Avegno, and during a part of the time you paid the rent to Morgan?

A. Yes, sir; I paid up to October, 1868, to Avegno. After that I paid to Morgan.

50 Q. How much did you pay to Morgan?

A. October, November, December, January & February—five months.

Q. That is to say you paid to Morgan from the period of his purchase up to the period of your purchase from him?

A. Yes, sir; I paid to Morgan before he purchased it, because he enjoined me from paying the rent.

Q. Did Schmidt & Ziegler also pay to Morgan prior to his purchase as they were enjoined from paying rent to Avegno?

Q. This injunction that you speak of against paying the rent to

A. Yes.

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Q. Did Schmidt & Ziegler also pay to Morgan prior to his purchase as they were enjoined from paying rent to Avegno?

Q. This injunction that you speak of against paying the rent to

Avegno must have occurred in connection with the suit of Morgan against Avegno?

A. He enjoined us April 11th and November 5th, 1868.

By Mr. VOORHIES:

Q. You mean he notified you?

A. Yes, sir.

By Mr. MILLER:

Q. That was evidently pending the suit against Avegno?

51 A. Yes, sir.

Q. Have you any paper to show anything of that kind?

A. Here is the paper "Q."

(Injunction or notification that the witness speaks of, is shown by the paper marked "Q," issued in the suit of Charles Morgan *vs.* Bernard Avegno, by the marshal.)

(Witness now produces another paper marked "Q," issued in the same suit, which he speaks of as the injunction dated April 11th, 1868, which paper states that the rent is seized in his hands by Charles Morgan.)

Q. It was under these papers that you paid the rent to Morgan?

A. Yes, sir; afterwards. I say I paid him October, November, December, January & February, because I didn't buy until March.

Q. Prior to your making any payment of rents to Morgan, to whom did you pay the rent of those premises?

A. To Bernard Avegno.

Q. Was there ever any interruption of payment of rents by you to Avegno?

52 A. No, sir; not to my knowledge.

Q. Was there ever any change of the possession of this property from Avegno to the United States marshal prior to the time of the seizure by Charles Morgan?

A. Not to my knowledge. I only had dealings with Avegno. Of course, as I stated, I paid one year in advance, and the second year I gave him my notes as is customary.

Q. There seems to have been proceedings by the United States against seven lots of ground, which was begun in 1865, in the United States district court; of course, you were the occupant of the property as the lessee of Avegno, at the time that the proceeding commenced?

A. No, sir; I only took it in the latter part of 1866. I didn't have anything to do with the property prior to that.

Q. When you became the occupant of the property in 1866, and subsequent, was or was not the property ever seized by the United States marshal?

A. Not to my knowledge.

Q. Had it been seized would you not have known it?

53 A. I never was notified; I knew nothing about it.

Q. Did the United States marshal ever place a keeper on the property subsequent to the time that you took possession of it?

A. No, sir; never.

Q. Was there ever any keeper placed on the property by the United States marshal at the time you leased when your possession began in 1866?

A. No, sir.

Q. So, then, at no time after you took possession of that store first as lessee or any other period, was there ever a keeper placed there by the United States marshal in the suit of The United States against Seven Lots of Ground?

A. Not to my knowledge.

Q. If there had been a keeper there you would necessarily have known it?

A. Yes, sir.

Q. Therefore, are you not able to state it as a fact that there was no keeper?

A. I don't know of any.

Q. Are you not certain there was none at the time you took possession?

54 A. I know nothing of it; at the time there was no keeper there to my knowledge.

Q. At any time subsequent to your taking possession was there ever a keeper there?

A. No, sir.

Q. Now, Mr. Schmidt, you purchased this property from Morgan in March, 1869?

A. Yes, sir.

Q. Has the property been improved since?

A. Yes, sir.

Q. What was the condition of the property in respect to improvements when you took possession; what buildings, if any?

A. There was on three lots a one-story warehouse, and on one of the lots was a two-story brick building.

Q. Was these buildings old or new?

A. They were old.

Q. What was their value; their character?

A. The buildings were of very little value; I had them pulled down and built up new.

Q. When did you pull them down?

55 A. I think it was either in 1869 or '70; I can tell by the bills.

Q. You say you pulled them down because they were of little value?

A. Yes, sir.

Q. These were all the improvements on the four lots of ground in controversy in this case at the time you bought from Morgan?

A. Yes, sir.

Q. What improvements, if any, have you put on the property since?

A. The entire old buildings was torn down.

Q. What buildings have you erected on the four lots since?

A. We erected a two-story brick building upon the whole ground.

Q. It extends over the whole four lots?

A. Yes, sir; it fronts on South Peters; it used to be called New Levee, and runs back to Fulton street.

Q. What is the width of the building, the front of the building?

A. I couldn't say exactly; I think each lot is about 21 or 22 feet. The width & depth of the lots is shown by the titles in evidence.

Q. What is the value of this building that you put up there?

56 A. Well, the original cost was twenty-six thousand & sixty-eight $\frac{9}{100}$ dollars.

Q. Was that the total of the original cost of the building?

A. No; there was six or seven thousand dollars spent, of course, in office fixtures and other improvements on the property. I think the whole cost was $33,000. This $26,068 and $7,000 more.

Q. Then as I understand the total cost of the improvements on the four lots of ground amount to $26,068, cost of erecting the building & $7,000 more in office & other improvements on the building?

A. Yes, sir.

Q. These improvements & fixtures are in the building?

A. Yes, sir; sample rooms & store rooms up stairs.

Q. They are part of the building?

A. Yes, sir.

Q. That is to say they were improvements to the building itself?

A. Yes, sir; they are stationary, fastened.

Q. (Witness produces bills marked from 1 to 30.) These are the bills?

57 A. Yes, sir.

(Witness now produces bills 1 to 30 which exhibit the cost of the improvements on the property involved in this suit made by Schmidt & Ziegler. These bills were all for improvements on the property and were paid by Schmidt & Ziegler. The amount of the bills is $26,068.92.

It is agreed between the parties that this amount, $26,068.92, shall be considered the cost of the improvements on the property paid by Schmidt & Ziegler without requiring the production of the bills themselves in the record of appeal or in any other stage of the proceedings, unless the parties desire it.

Mr. VOORHIES adds: In case of appeal it is understood that these bills of item shall not be copied in the transcript, the parties being satisfied with their production.)

Q. These bills show the cost of the bricks, lumber, & ma-

58 terials used in the construction of the building, the compensation paid, the architect, the labor paid, the painters, carpenters, & of all labor upon the building?

A. Yes, sir.

Q. These payments for the improvement of the ground appear to have been paid by Schmidt & Ziegler in the fall of 1869. The date of the receipt of Mr. Wing is Nov. 15th, 1869?

A. That is the time. They were paid in September, October, & November, when the last payment was made of the $26,068.

Q. Now, Mr. Schmidt, to what extent, in your opinion, have these improvements added to the value of that property?

A. Well, added considerably, because without those improvements I couldn't carry on my business.

Q. Do you consider that they have added to the value of the property the full extent of the amount expended by Schmidt & Ziegler, $26,068?

A. Yes, sir; otherwise I shouldn't have made it.

59 Q. In other words, when you purchased the property from Chas. Morgan did you consider that the property was then worth much more than the value of the ground, or do you add anything to the value of the improvements which stood then on the property?

A. I consider that the property cost me in the neighborhood——

Q. What was the value of the property when you bought it? Was it worth much more than the value of the ground at the time?

A. No, sir; it was not worth much more, because the building on it hadn't much value.

Q. So, then, you consider that the improvements that you have put on the property since, this big store covering the entire front and running through the entire depth, you consider that this building purchased and paid for by Schmidt & Ziegler has added to the value of the property fully $26,000?

A. Fully.

60 Q. In addition to these $26,000 you spoke of $7,000 besides, do you consider that the building was improved to the extent of $7,000 besides?

A. It improves it to that extent that it facilitates the carrying on of business in the establishment.

Q. Then, you would add the increased value by adding $7,000 to the $26,000?

A. Yes, sir.

Q. In your opinion the property then has improved in value by the additions made and improvements made by Schmidt & Ziegler since that time to the amount of $33,000?

A. Yes, sir.

Q. Those improvements were made in 1869?

A. Yes, sir.

(It is admitted that from the year 1869 to 1879, inclusive, Schmidt & Ziegler have paid the State and city taxes upon the property involved in this controversy to the amount of $14,447, to which is to added taxes paid for the year '80, and the current year '81.)

Q. What is the valuation of the property this year?

61 A. Well, I believe they advanced it to $35,000 or $40,000.

(It is admitted that the taxable appraisement is $35,000, and the taxes for '80 & '81 would be 1 per cent. for the State, and 1.40 for the city.)

By Mr. LEOVY:

Q. I understand, Mr. Schmidt, that you state that you leased these premises in November, 1866?

A. In October, 1866.

Q. You at first rented it for one year?

A. Yes, sir.

Q. That is, to October, 1867?

A. Yes; then October, 1867, I rented it for another year.

Q. Then, having rented for another year from October, '67, it carried you to October, '68?

A. Yes, sir.

Q. From the beginning of your lease up to April, 1868, you paid the rent to Mr. Avegno, and from April, '68, you paid rent to Charles Morgan under that notice "Q?"

A. No; I paid it to Avegno to October, 1868. I had two years' lease.

62 Q. You didn't pay him to October, '68; you got a notice not to pay before the end of your lease?

A. Our notes——

Q. You paid to Avegno from October, '66, to October, 1867?

A. Yes, sir.

Q. And you continued to pay Avegno on the second year's lease up to what time?

A. We paid two notes to Avegno; the last note was paid April 4th, 1868.

Q. After April, 1868, you paid to Chas. Morgan?

A. No, sir; those two notes from April, 1868, to the 1st of October had been negotiated by Avegno, and they were paid by us; I didn't pay them until Morgan had purchased the property in 1869, because I received notice from Morgan not to pay the rent after he became the purchaser; when we purchased the property from him those notes were still outstanding against Schmidt & Ziegler.

Q. The consequence is, you paid to Avegno, or the transferree of the notes?

63 A. Yes, sir.

Q. The notification was defeated by the fact that Avegno had transferred the note?

A. Yes, sir.

Q. You have stated that on the 21st of December, 1868, Mr. Morgan bought the property?

A. Yes, sir.

Q. Then you paid to Mr. Morgan the rent from the 21st of December, 1868, until the date you purchased the property yourself?

A. I paid the rent to Morgan from October, 1868; we paid him five months' rent.

Q. You paid Morgan from the 1st of October, 1868?

A. Yes, sir.

Q. Until March, '69, when you yourself purchased the property?

A. Yes, sir.

Q. What rent did you pay to Mr. Morgan?

A. Well, we paid him the same rent as was stipulated with Avegno, at the rate of $6,500.

Cross-examination by Mr. VOORHIES:

64 Q. Was that the real value of the rent of the property then?

A. Well, rent was very high then.

Q. But it was the real value?

A. Of course, anything brought that must have been the real value.

Q. What is the value of the property now, about, on a cash valuation?

A. Well, that is very hard to say, what it would be worth to-day.

Q. Well, about.

A. Well, I suppose in the neighborhood of $40,000 or $50,000; about $40,000; I don't think it would bring more than that.

JOHN E. RUTER sworn for defendants and warrantors.

(It is admitted that the witness will give the same testimony as Mr. W. D. Schmidt has given with reference to all the points involved in this case.)

Direct examination by Mr. MILLER:

Q. How long have you been in the employ of Schmidt & Ziegler?

A. About 30 years.

Q. Then you were in the employment of Schmidt & Ziegler,
65 in the building of Schmidt & Ziegler in controversy in this case, in 1865, '66, '67, & since that time?

A. Yes, sir.

Q. Did the United States marshal in the proceedings of the United States against seven lots of ground, confiscation proceedings, ever seize the property in controversy in this case?

A. No, sir; not to my knowledge.

Q. If there had been a seizure would you have known it?

A. Certainly.

Q. Can you state as a fact whether or not any keeper was ever placed by the marshal on that property?

A. No, sir; no keeper was there.

Q. You were in the property daily, exercising your daily avocation?

A. Yes, sir.

Q. You are enable to state as a fact that the marshal never placed a keeper there; that is to say, since the date that Schmidt & Ziegler took possession as lessees—since 1866?

A. Yes, sir.

Q. You are confident that from that date there was no
66 seizure of that property?

A. Yes, sir.

Q. During that time, from 1866 down to the period that Schmidt & Ziegler acquired the property from Charles Morgan in March, 1869, to whom did Schmidt & Ziegler pay rent for the property?

A. Two years to Bernard Avegno; from the 1st of October, 1866, to 1st October, 1868.

Q. After that period—after the purchase by Charles Morgan, to whom did Schmidt & Ziegler pay?

A. Charles Morgan.

Q. From 1866 to '69 was there any impediment produced by any seizure or any legal proceedings against Schmidt & Ziegler paying this rent?

A. No, sir; none.

By Mr. LEOVY:

Q. Have you any interest in the house of Schmidt & Ziegler?

A. No, sir.

Q. You have got a salary?

A. Yes, sir.

No cross-examination.

67 *Petition of Appeal. Filed Jan. 6th*, 1882.

W'D'W B. AVEGNO & *al.*
vs.
SCHMIDT & ZIEGLER. } No. 1996.

To the hon. judges of the civil district court for the parish of Orleans:

The petition of Mrs. Widow Bernard Avegno, tutrix of Albert Avegno, of Pierre Avegno, of Bernard Avegno, Jr., of Lucie Avegno, wife of Wm. Voorhies; of Marie Avegno, wife of Leandre Leroy, respectfully represents: That they are aggrieved by the judgment rendered against them in the matter of W'd'w Avegno & *als. vs.* Wm. B. Schmidt & *al.*, No. 1996, of this court, which judgment was signed June 27th, 1881.

Wherefore they pray for an appeal, returnable to the supreme court of Louisiana, in due course, &c., that the amount of bond for appeal be fixed, and that the defendants and warrantors and all parties in interest be duly cited to answer said appeal.

68 Prays for general relief; and, as in duty bound, etc.

(Signed) ALBERT VOORHIES, *Att'y.*

Order Granting Appeal.

Let an appeal be granted, as prayed for, on plaintiffs furnishing bond & surety, as required by law, in the sum of fifty dollars, and let said appeal be made returnable to the supreme court on the first Monday of February, A. D. 1882, the length of the transcript being such as to require that time to prepare the same, and let the defendants and warrantors be notified hereof.

New Orleans, the 4th day of January, 1882.

(Signed) N. H. RIGHTOR, *Judge.*

Appeal Bond. Filed January 6th, 1882.

Know all men by these presents, that we W'd'w Bernard Avegno, Pierre Avegno, Bernard Avegno, Jr., Lucie Avegno, wife of
69 William Voorhies; Marie Avegno, wife of Leandre Leroy, as principals, and James P. Guinault, as surety, are held and firmly bound unto James T. Clark, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of fifty ($50.00) dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seal, and dated in the city of New Orleans on this 4th day of January, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas the above-bounded plaintiffs filed a petition of appeal from a final judgment rendered against them in the suit of W'd'w B. Avegno & *als. vs.* W. B. Schmidt & Ziegler, No. 1996, of the civil district court for the parish of Orleans, on the — day of June, 1881, and signed on the 27th day of June, 1881:

Now, the condition of the above obligation is such, that the
70 above-bound principals shall prosecute their appeal and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate, real or personal, if they be cast in the appeal; otherwise, that the said surety shall be liable in their place.

(Signed) ALBERT VOORHIES, [SEAL.]
Att'y of Plaintiffs.

(Signed) JAS. P. GUINAULT. [SEAL.]

71 *Record No.* 3651. *United States Circuit Court. Filed May 3rd*, 1881. *Offered in Evidence by Plaintiff.*

U. S. Circuit Court.

THE UNITED STATES
vs.
SEVEN LOTS OF GROUND, property of Bernard Avengo. } 3651.

To the Honorable Edward H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The libel of information of Rufus Waples, attorney of the United States of America for the eastern district of Louisiana, who prosecutes for the said United States in this behalf, and being here present in court in his own proper person, in the name and behalf of the said United States of America against the "estate, property, money, stocks, credits, and effects" hereinafter described, and against all persons intervening for their interest therein in a case of seizure and forfeiture, alleges, propounds, and declares as follows:

72 1st. That Benjamin F. Flanders, supervising special agent of the Treasury Department, by virtue of the act of Congress approved on the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and

confiscate the property of rebels, and for other purposes," heretofore, that is to say, on the fifteenth day of May, in the year one thousand eight hundred and sixty-three, seized as forfeited to the United States, at New Orleans, within said district, and within the jurisdiction of this court, four certain lots of ground, with all the buildings & improvements thereon, situate in the first district in this city, in Sq. No. 15, bounded by New Levee, Fulton, Gravier, & Poydras streets, and designated by the Nos. 9, 10, 11, & 12, as per plan of Hugh Grant, surveyor, deposited in the office of H. B. Cenas, notary public,
73 dated January 12th, 1862, each lot measuring 24 feet 6 inches 3 lines front on New Levee St., & 22 feet 8 inches 3 lines front on Fulton street, by a depth as follows :

Lot No. 9, 118 feet 7 inches & 2 lines on the side of lot No. 8 ; 118 feet 5 lines on the side of lot No. 10 ; lot No. 10, 118 feet 5 lines on the side of lot No. 9, & 117 feet 6 inches 3 lines on the side of lot No. 11 ; lot No. 11, 117 feet 6 inches 3 lines on the side of lot No. 10, & 116 feet 11 inches 3 lines on the side of lot No. 12 ; lot No. 12, 116 feet 11 inches 3 lines on the side of lot No. 11, & 116 feet 4 inches 6 lines on the side of lot No. 13.

Acquired by purchase from Joseph M. Laborde, curator of the estate of I. Y. L. Y Purda & of Jose Martinez Campo, executor of the last will of Angel Xiquez, for account of the two successions, as per act passed before Theodore Guyol, notary public, dated Feb'y 23d, 1860, a certain lot of ground, with all the buildings and improvements thereon, situate in the first district of this city, in
74 square No. 221, bounded by St. Charles, Carondelet, Poydras, & Perdido streets, measuring 25 feet 6 inches & 4 lines front on St. Charles St., by a depth of 100 feet between parallel lines, known as No. 97 St. Charles street, acquired by purchase as follows: One undivided third at public auction, sheriff's sale, executed by E. T. Parker, sheriff of the parish of Orleans, June 28th, 1858. One undivided third from Henry Alexander Lessassier, as per act passed before Richard Brennan, not. pub., dated June 8th, 1859. One undivided third of George Binder, as per act of sale passed before Theodore Guyol, notary public, dated March 26th 1862.

A certain lot of ground, with all the buildings & improvements thereon, situate in the 2nd district in this city, in the square No. 17, bounded by St. Peter, Bourbon, Dauphin, & Orleans street-, measuring in French measure 30 feet front on St. Peter street by 74
75 feet in depth, between parallel lines, and on one side bounded by property of P. Avegno, & on the other side by property of Madame Montané, acquired by purchase from Wm. Guednard, as per act passed before A. Ducatel, notary public, dated December 14th, 1860, all the right, title, & interest in a certain lot of ground in this city, in the first district, in square bounded by Fulton, Front, Lafayette, and Girod streets, and designated by No. 15, as per plan known as J. A. Beard's plan, duly certified to by Hugh Grant, civil engineer, and measuring 24 feet 2 in. 7 lines front on Fulton street, & 24 feet 3 inches 3 lines on Front street, by a depth of one hundred & twenty feet 1 inch & 2 lines on the line dividing it from lot No. 14, and on the opposite side line and front on Girod street,

acquired by purchase of Mrs. C. Rose Alvarez, of Paris, France,
represented by Robert Murphy, agent and attorney in fact, as
76 per act passed before Amedée Ducatel, notary public, dated
Feb'y 29th, 1860.

2d. That Bernard Avegno is and was on the 17th day of July, 1862, and previously thereto, had been the owner of the above-described property.

III. That certain States forming a part of the territory, and constituting a part of the United States of America, specifically enumerated by the President of the United States in his proclamation, duly issued and bearing date the first day of July, A. D. eighteen hundred and sixty-two, are now engaged, and were at the time said proclamation was issued, engaged, and have since continued to be engaged, in armed rebellion against the lawful authority of the United States.

IV. That by the act of Congress of the United States, approved the 17th day of July, in the year of our Lord 1862, entitled
"An act to suppress insurrection, to punish treason and
77 rebellion, to seize and confiscate the property of rebels, and
for other purposes," provision was made for the seizure and confiscation of the property of persons engaged in armed rebellion against the lawful authority of the United States, and of other persons, as therein set forth.

V. That the said Bernard Avegno, subsequently to the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, did act as an officer of the army of the rebels in arms against the Government of the United States, and as a commissioner of the so-called Confederate States of America; and that, while owning property in a loyal State or Territory of the United States, or of the District of Columbia, he did give aid and comfort to the rebellion against the United States, and did assist such rebellion.

78 VI. That the said Bernard Avegno, subsequently to the said seventeenth day of July, in the year of our Lord one thousand eight hundred & sixty-two, did hold an office in the so-called Confederate States of America, after having held an office of trust or profit in the United States, and did hold an office or agency under the government of the so-called Confederate States of America, or under one of the States thereof, said office being national, State, or municipal in its name or character, which said office or agency he accepted after the date of the pretended ordinance of secession of the State of Louisiana; that he did take an oath of allegiance to or to support the constitution of the so-called Confederate States.

VII. That the said Bernard Avegno, subsequently to the said seventeenth day of July, in the year of our Lord one thou-
79 sand eight hundred and sixty-two, within a State or Territory of the United States, was engaged in armed rebellion against the Government of the United States, and did not, within sixty days after public warning and proclamation duly given and made by the President of the United States on the twenty-fifth day of July, in the year one thousand eight hundred and sixty-two, cease

to aid, countenance, and abet such rebellion and return to his allegiance to the United States.

VIII. That the said Bernard Avegno subsequently to the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, within a State or Territory of the United States, was engaged in aiding and abetting an armed rebellion against the Government of the United States, and did not,
80 within sixty days after public warning and proclamation, duly given and made on the twenty-fifth day of July, in the year one thousand eight hundred and sixty-two, by the President of the United States, cease to aid, countenance, and abet such rebellion and return to his allegiance to the United States.

IX. That by reason of the premises the property herein described, and all the right, title, interest, and estate of the said Bernard Avegno herein, became and was forfeited to the United States and ought to be condemned to their use.

Wherefore the said attorney, in the name and behalf of the United States of America, prays that process of monition may issue against the said property and the owner and owners thereof, and against all persons interested or claiming an interest therein, warning them at some early day to be named therein to appear &
81 answer this libel of information, & that an order of publication may be made [in] the usual form, & the court may grant further & other relief as to law & justice may appertain, & as this court is competent to give in the premises, & that after due proceedings had the same, may be condemned to the United States, and he prays for further relief.

(Signed) RUFUS WAPLES,
U. S. Dist. Att'y for the East. Dist. of La.

UNITED STATES
vs.
SEVEN LOTS OF GROUND, the Property of B. Avegno. } No. 7972.

Whereas certain property fully described in the libel filed by the district att'y & now of record in this court, together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging, or in anywise appertaining, and all the right, title, & interest of Bernard Avegno
82 therein, has been seized by the marshal of the United States for the eastern district of Louisiana, by virtue of an act of Congress approved on the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and other purposes;" and whereas the United States attorney for the eastern district of Louisiana did, on the 20th day of Jan'y, A. D. 1865, file a libel of information in this court praying the condemnation of said property and real estate under the act aforesaid, and that process of monition issue against the owner and owners of said property and real estate, and all per-

sons interested or claiming an interest therein, warning
83 them at some early day to appear and answer said information:

It is, therefore, on this 20th Jan'y, in the year of our Lord one thousand eight hundred and sixty-five, ordered that notice be given to the owner and owners of said property & real estate, and all persons interested or claiming an interest therein, to appear and answer this information on the 17th day of Feb'y, 1865, and show cause, if any they have, why said property and real estate, and the right, title, and interest therein of the said Bernard Avegnor should not be condemned and sold according to law, and that notice be given by posting a copy of this order upon the front door of the court-house of the district, & by publication in the True Delta newspaper twice a week previous to said 17th day of Feb'y, A. D. 1868, the first publication to be on or before the 25th instant.

(Sig'd) E. H. DURELL, *Judge.*

N. O., Jan'y 20th, 1865.

84 The President of the United States of America to the marshal of the eastern district of Louisiana, or to his lawful deputy, Greeting:

You are hereby commanded forthwith to seize, and into your possession take, the seven lots of ground, fully described in the libel filed by the dis't att'y, & now of record in this court, together with all the buildings & improvements, & all the rights, privileges, & other hereditaments thereunto belonging, & all the right, title, & interest of Bernard Avegno therein, now libelled by the United States, for the causes set forth in the libel now pending in the district court of the United States for the eastern district of Louisiana; that you do cite and admonish the owner or owners, & all and every other person or persons having or pretending to have any right or interest in or to the same, to be and to appear before a dis-
85 trict court of the United States for the district aforesaid, to be holden at the city of New Orleans, on or before the third Monday from the service hereof, to show cause, if any they have or can, why the said property should not be condemned and sold agreeably to the prayer of the libellant, and how you have executed this warrant; that you make return according to law.

Witness the Honorable Edward H. Durell, judge of the said court, at New Orleans, this 20th day of January, 1865, and the 89th year of the Independance of the United States.

[SEAL.] (Signed) W. S. BENEDICT,
D'y Clerk.

Marshal's Return.

Received Jan'y 20th, 1865, & in obedience to the within warrant seized & took into my possession the within-described property, posted copies of this warrant, the libel and order of the judge
86 on the door of the court-house, & published monition in the

True Delta, a daily newspaper printed & published in New Orleans, on the 24th, 31st Jan'y, & 4th & 11th Feb'y, 1865.
Ret'd 14th Feb'y, 1865.
(Signed) A. BOISBLANC,
D'y Marshal.

Intervention of Charles Morgan. Filed April 13th, 1865.

U. S. Dist. Court, E. D. of La.

THE UNITED STATES
vs.
SEVEN LOTS OF GROUND, the Property of B. AVEGNO.

To the honorable the district court of the United States, Eastern District of Louisiana:

The claim & petition in intervention in the above-entitled case of Charles Morgan, a citizen of the city and State of New York, & a loyal citizen of the United States, respectfully represents: That the libel of information filed in this honorable court in the
87 said above-entitled case by the United States prays for the condemnation to the use of the United States, as forfeited & subject to confiscation under the act of Congress referred to therein, of certain property as the property of Bernard Avegno, and among other property of four certain lots of ground with all the buildings & improvements thereon situated, in the first district of the city of New Orleans, in the square bounded by New Levee, Fulton, Gravier, & Poydras streets, & designated by the Nos. 9, 10, 11, & 12 on a plan drawn by Hugh Grant, surveyor, on the 12th of January, 1852, & deposited in the office of the late H. B. Cenas, a notary public in the city of New Orleans, of which said lots No. 9 has 24 feet 6 inches 3 lines front on New Levee St.; 22 feet 8 inches front on Fulton St., by a depth of 118 feet 7 inches 2 lines on the side of lot No. 8, & 118 feet 5 lines on the side of lot No. 10. Lot
88 No. 10 has 24 feet 6 inches 3 lines front on New Levee St., 22 feet 8 inches & 5 lines front on Fulton St., by a depth of 118 feet 5 lines on the side of lot No. 9 & of 117 feet 6 inches & 3 lines on the side of lot No. 11. Lot No. 11 has 24 feet 6 inches 3 lines front on New Levee St.; 22 feet 8 inches & 5 lines front on Fulton St., by a depth of 117 feet 6 inches & 3 lines on the side of lot No. 10, & of 116 feet 11 inches & 3 lines on the side of lot No. 12, & lot No. 12 has 24 feet 6 inches & 2 lines front on New Levee St., 22 feet 8 inches & 5 lines front on Fulton St., by a depth of 116 feet 11 inches & 3 lines on the lot No. 11, & of 116 feet 4 inches & 6 lines on the side of lot No. 13.

Now your claimant & petitioner in intervention further represents that he had a *bona fide* claim against the said property & bearing mortgage on the same under the laws of Louisiana for the sum of thirty-six thousand four hundred dollars ($36,400),
89 with interest at the rate of 8 per cent. per annum on the sum of $11,483.33⅓ from 3rd of April, 1863, & on $12,133.33⅓

from 3d of April, 1864, & on $12,783.33⅓ from 3rd of April, 1865, & 5 per cent. in addition to the total amount for this, to wit:

That by public act passed on the 3d day of April, 1862, before Selim Magner, a notary public in & for this city & parish of New Orleans, duly commissioned & sworn, an authentic copy of which is herewith filed for reference, the said Bernard Avegno acknowledged himself justly & truly indebted to Israel C. Harris, of the city of New Orleans, in the full sum of thirty-six thousand four hundred dollars, for which he made & subscribed his six several promissory notes dated on the said 3d day of April, 1862, to the order of & endorsed by himself, three for the sum of $10,833.33⅓ each,
90 payable respectively in one, two, & three years, one for $650, payable in one year; one for $1,300, payable in two years, and one for $1,950, payable in three years at the Louisiana State Bank in the city of New Orleans, & bearing interest at the rate of 8 per cent. per annum from maturity until paid, which notes after being paraphed by the said notary to identify them with the said act were delivered to the said Israel C. Harris, by which means the said Bernard Avegno became bound & liable to pay to the said Israel C. Harris the said sums in said notes specified according to their tenor & effect that in order to secure the full & final payment of the principal & eventual interest of the said notes & of 5 per cent. on the amount of said principal & interest as lawyer's or attorney's fees, he, the said Bernard Avegno, by the stipulation contained in the said act, specially mortgaged & hypothecated the said
91 before-described property to the said Israel C. Harris & the holder or holders of said notes; that by a public act passed before the said Selim Magner, a notary public as aforesaid in the city of New Orleans, on the 17th day of May, 1864, an authentic copy of which is also herewith filed for reference, the said Israel C. Harris transferred, assigned, set over, & delivered to your claimant & petitioner the said six notes for a valuable consideration as set forth in said act, & that in the premises your claimant & petitioner, as the legal holder of the said notes, is now seized & possessed of the said right of mortgage & hypothecation, as stipulated in the said act dated on the said 3d day of April, 1862, & that the same constitute a valid claim against the said property, which he is now entitled to enforce against the same under the laws of the United States. And your claimant & petitioner further represents
92 that he is not informed, does not believe, and now specially denies that the said Bernard Avegno has done or committed subsequently to the the said 17th day of July, 1862, any of the acts alleged & charged against him in said libel; that your claimant & petitioner has never at any tsme participated in any of the acts done by the said Avegno, and that he is informed and verily believes and avers that no acts done by the said Avegno prior to the said 17th July, 1862, and to the execution of the said public act on the 13th day of April, 1862, can in any manner affect the validity of the said claim.

Your claimant & petitioner further represents that he is the sole

owner of the said claim, as herein set forth, and that no other person or persons has or have any right, title, or interest therein.

Wherefore your claimant & petitioner prays that the said property may be adjudged & decreed not to be subject to be
93 condemned as forfeited to the United States, and that the libel of information may be dismissed as to the said property.

Now, your claimant & petitioner further prays that if the said property should be condemned as forfeited to the United States, that then & in that case he may be adjudged & decreed to be a mortgage creditor of the said Bernard Avegno for the said sum of thirty-six thousand four hundred dollars ($36,400), with interest at the rate of 8 per cent. p'r an. on $11,483.33⅓ from the 3d of April, 1863; on $12,133.33⅓ from the 3d of April, 1864, & on $12,783.33⅓ from the 3d of April, 1865, and an additional five per cent. on the total amount of the debt & interest, & that it may be further adjudged & decreed that the said debt due to him is one which your claimant and petitioner is entitled to enforce specifically against the said prop-
94 erty, & that it be ordered that the said mortgage claim be satisfied, according to law, out of the proceeds of the said property.

Your claimant & petitioner further prays for all & general the relief that he may be entitled to in law & equity, or that the nature of the case may require.

(Signed) MILES TAYLOR,
Proctor.

Israel C. Harris, of the city of New Orleans, being duly sworn, says he is a loyal citizen of the United States; says that he is a duly appointed attorney-in-fact of Charles Morgan, of New York, the above-named claimant & petitioner, & that the facts stated & set forth in the said petition are true to the best of his knowledge & belief.

(S'g'd) I. C. HARRIS.

Sworn and subscribed before me, this 13th April, 1865.

(S'g'd) K. LOEW, *D'y C'k.*

95 *Note of Evidence Taken on the Trial July 10th*, 1865.

UNITED STATES
vs. } 7972.
THE PROPERTY OF B. AVEGNO.

The district attorney moves for a judgment *be* default.

Ralli, Benachi & Co. offered in evidence the act of sale from Avegno to G. Binder, marked A; also act of sale, marked B, & certificates thereto attached; also certificate from mortgage office, marked C.

Charles Morgan offered docts. D, E, & F, & notes G, H, I, K, L, & M.

Wm. Lorenzon offered documents N & O.

Citizens' Bank offered documents P, Q, R, S, T, & U.

Wm. Guesnard offered documents V, W, X, Y, Z, & 1 & 2.

The district attorney declining to offer in evidence the testimony

of the witnesses examined before the commissioner of the U. S., said testimony is now offered by Mr. Taylor, Esq., proctor for
96 intervenor Charles Morgan.

Doc't D, Offered in Evidence by Charles Morgan on the Day of Trial, July 10th, 1865.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that on this day before me, Selim Magner, a notary public in & for the city & parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, and in the presence of the witnesses hereinafter named & undersigned, personally came & appeared Bernard Avegno, of this city, who declared & acknowledged that he is justly and truly indebted unto Israel C. Harris, of this city, in the full sum of thirty-six thousand four hundred dollars, for the reimbursement whereof he has made & subscribed six several promissory notes, dated this day, to the order of and endorsed by himself, three for the sum of ten thousand eight hundred &
97 thirty-three dollars 33⅓ cents, each payable, respectively, in one, two, & three years; one for six hundred & fifty dollars, payable in one year; one for thirteen hundred dollars, payable in two years, & one for nineteen hundred & fifty doll's, payable in three years, at the Louisiana State Bank in this city, & stipulating to bear interest at the rate of 8 per cent. per annum from maturity until paid (as a penal clause): Now, in order to secure in capital eventual interest the full & final payment of the said six several promissory notes (which notes, after having been by me, notary, duly parap-hed, in order to identify the same herewith, have been delivered unto the said Israel C. Harris, here present, acknowledging the receipt thereof, & accepting these presents), he, the said Bernard Avegno, does by these presents, for himself & his heirs, specially mortgage & hypothecate unto the said Israel C. Harris, and
98 such person or persons who may eventually be the holder or holders of the said six several promissory notes—

Four certain lots of ground, with the buildings & improvements, situated in the first district of this city, in the square bounded by New Levee, Fulton, Gravier, and Poydras streets, designated by Nos. 9, 10, 11, & 12, on a plan drawn by Hugh Grant, surveyor, on the 12th of January, 1852, deposited in the office of the late H. B. Cenas, notary, in this city, lot No. 9 having 24 feet 6 inches 3 lines front on New Levee St., 22 feet 8 inches front on Fulton St., by a depth of 118 feet 7 in. 2 lines on the side of lot No. 8, & of 118 feet 5 lines on the side of lot No. 10.

Lot No. 10 having 24 feet 6 in. 3 lines front on New Levee St., 22 feet 8 inches 5 lines front on Fulton St., by a depth of 118 feet & 5 lines on the side of lot No. 9, & of 117 feet 6.3 on the side of lot No. 11. Lot No. 11 having 24 feet 6 in. 3 lines front on New Levee
99 street, 22 feet 8 inches and 5 lines front on Fulton St., by a depth of 117 feet 6 in. 3 lines on the side of lot No. 10, and of 116 feet 11 inches and 3 lines on the side of lot No 12, and lot No. 12 having 24 feet 6 in. 2 lines front on New Levee St., 22 feet 8 in.

owner of the said claim, as herein set forth, and that no other person or persons has or have any right, title, or interest therein.

Wherefore your claimant & petitioner prays that the said property may be adjudged & decreed not to be subject to be
93 condemned as forfeited to the United States, and that the libel of information may be dismissed as to the said property.

Now, your claimant & petitioner further prays that if the said property should be condemned as forfeited to the United States, that then & in that case he may be adjudged & decreed to be a mortgage creditor of the said Bernard Avegno for the said sum of thirty-six thousand four hundred dollars ($36,400), with interest at the rate of 8 per cent. p'r an. on $11,483.33⅓ from the 3d of April, 1863; on $12,133.33⅓ from the 3d of April, 1864, & on $12,783.33⅓ from the 3d of April, 1865, and an additional five per cent. on the total amount of the debt & interest, & that it may be further adjudged & decreed that the said debt due to him is one which your claimant and petitioner is entitled to enforce specifically against the said prop-
94 erty, & that it be ordered that the said mortgage claim be satisfied, according to law, out of the proceeds of the said property.

Your claimant & petitioner further prays for all & general the relief that he may be entitled to in law & equity, or that the nature of the case may require.

(Signed) MILES TAYLOR,
Proctor.

Israel C. Harris, of the city of New Orleans, being duly sworn, says he is a loyal citizens of the United States; says that he is a duly appointed attorney-in-fact of Charles Morgan, of New York, the above-named claimant & petitioner, & that the facts stated & set forth in the said petition are true to the best of his knowledge & belief.

(S'g'd) I. C. HARRIS.

Sworn and subscribed before me, this 13th April, 1865.

(S'g'd) K. LOEW, *D'y C'k.*

95 *Note of Evidence Taken on the Trial July 10th*, 1865.

UNITED STATES
vs. } 7972.
THE PROPERTY OF B. AVEGNO.

The district attorney moves for a judgment *be* default.

Ralli, Benachi & Co. offered in evidence the act of sale from Avegno to G. Binder, marked A; also act of sale, marked B, & certificates thereto attached; also certificate from mortgage office, marked C.

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The district attorney declining to offer in evidence the testimony

of the witnesses examined before the commissioner of the U. S., said testimony is now offered by Mr. Taylor, Esq., proctor for
96 intervenor Charles Morgan.

Doc't D, Offered in Evidence by Charles Morgan on the Day of Trial, July 10th, 1865.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that on this day before me, Selim Magner, a notary public in & for the city & parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, and in the presence of the witnesses hereinafter named & undersigned, personally came & appeared Bernard Avegno, of this city, who declared & acknowledged that he is justly and truly indebted unto Israel C. Harris, of this city, in the full sum of thirty-six thousand four hundred dollars, for the reimbursement whereof he has made & subscribed six several promissory notes, dated this day, to the order of and endorsed by himself, three for the sum of ten thousand eight hundred &
97 thirty-three dollars 33⅓ cents, each payable, respectively, in one, two, & three years; one for six hundred & fifty dollars, payable in one year; one for thirteen hundred dollars, payable in two years, & one for nineteen hundred & fifty doll's, payable in three years, at the Louisiana State Bank in this city, & stipulating to bear interest at the rate of 8 per cent. per annum from maturity until paid (as a penal clause): Now, in order to secure in capital eventual interest the full & final payment of the said six several promissory notes (which notes, after having been by me, notary, duly parap-hed, in order to identify the same herewith, have been delivered unto the said Israel C. Harris, here present, acknowledging the receipt thereof, & accepting these presents), he, the said Bernard Avegno, does by these presents, for himself & his heirs, specially mortgage & hypothecate unto the said Israel C. Harris, and
98 such person or persons who may eventually be the holder or holders of the said six several promissory notes—

Four certain lots of ground, with the buildings & improvements, situated in the first district of this city, in the square bounded by New Levee, Fulton, Gravier, and Poydras streets, designated by Nos. 9, 10, 11, & 12, on a plan drawn by Hugh Grant, surveyor, on the 12th of January, 1852, deposited in the office of the late H. B. Cenas, notary, in this city, lot No. 9 having 24 feet 6 inches 3 lines front on New Levee St., 22 feet 8 inches front on Fulton St., by a depth of 118 feet 7 in. 2 lines on the side of lot No. 8, & of 118 feet 5 lines on the side of lot No. 10.

Lot No. 10 having 24 feet 6 in. 3 lines front on New Levee St., 22 feet 8 inches 5 lines front on Fulton St., by a depth of 118 feet & 5 lines on the side of lot No. 9, & of 117 feet 6.3 on the side of lot No. 11. Lot No. 11 having 24 feet 6 in. 3 lines front on New Levee
99 street, 22 feet 8 inches and 5 lines front on Fulton St., by a depth of 117 feet 6 in. 3 lines on the side of lot No. 10, and of 116 feet 11 inches and 3 lines on the side of lot No 12, and lot No. 12 having 24 feet 6 in. 2 lines front on New Levee St., 22 feet 8 in.

5 lines front on Fulton St., by a depth of 116 feet 11 inches 3 lines on the side of lot No. 11, and of 116 feet 4 inches & 6 lines on the side of lot No. 13.

All which property was acquired by said Avegno by purchase from the estate of Juan Ignacio Laborde y Rueda and Angel Xiques, deceased, by act passed before Theodore Guyol, a notary public, in this city, on the 23 Feb'ry, 1860.

The said premises are so to remain mortgaged and hypothecated until the full and final payment of the aforesaid promissory notes in capital and eventual interest, the said mortgager hereby binding himself and his heirs not to sell, alienate, nor encumber the same to the prejudice of these presents.

100 And the said mortgager further declared that he does by these presents bind & obligate himself to cause all & singular the buildings and improvements on the lots of ground afore described to be insured & kept insured against the risk of fire by one of the insurances offices in this city up to at least $10,000 & until the full and final payment of said afore-described promissory notes, and to transfer and deliver unto the said mortgagee the policy or policies of such insurance or insurances, in default whereof said mortgagee and any & all holders of said promissory notes is & are hereby authorized to cause such insurance or insurances to be made & effected at the cost, charge, & expense of the said mortgager. And the said mortgager further declared that he does by these presents consent, agree, and stipulate that in the event of the said promissory notes not being punctually paid at their maturity, it shall be lawful for,

101 & he does hereby authorize the said mortgagee, or any other holder or holders thereof, to cause all & singular the premises hereinbefore described & herein mortgaged to be seized & sold under executory process (issued by any competent court) without appraisement, to the highest bidder, payable cash, the said mortgager hereby expressly dispensing with all & every appraisement thereof, & by these presents waiving & removing the benefit of appraisement of all laws or parts of laws relative to the appraisement of movable or immovable effects, &c., seized & sold under executory process or other legal process, the said mortgager hereby confessing judgment in favor of said mortgagee, and such person or persons who may be the holder or holders of said promissory notes, for the full amount thereof, capital and interest, & together with all costs, charges, & expenses whatsoever.

102 And the said mortgager further declared that he does by these presents bind & obligate himself & his heirs to pay & reimburse unto said mortgage- & such person or persons who may be the holder or holders of said promissory notes, all such lawyers' or attorneys' fees together with all such costs, charges, and expenses as said mortgagee or any such holder or holders may or shall incur or pay, in the event of the non-payment of said promissory notes at maturity, said attorneys' fees, however, to be fixed at 5 per cent. on the amount sued for.

Now to secure the faithful performance of the foregoing obligations & the reimbursement & payment of the said lawyers' or attorneys'

fees, costs, and expenses aforesaid, & the reimbursement of all premium or premiums as shall be paid by the said mortgagee or any holder or holders of the aforesaid promissory notes in causing insurance to be effected, on the default of said mortgagor, as aforesaid, he, the mortgagor, does by these presents further specially mortgage & hypothecate the hereinbefore described premises into & in favor of the said mortgagee & all holders of said promissory notes.

According to the annexed certificate of the recorder of mortgages in & for this city and parish it appears that said property stands encumbered in the name of said Avegno by the general mortgage he granted in favor of Mrs. Jeanne Marie Justine Durel, his wife, resulting from their marriage contract executed before L. T. Caire, notary, on the 24th day of October, 1846, to which mortgage the said Mrs. Avegno will immediately renounce, so far as the presently mortgaged property is concerned.

The said mortgagor also declared that he is neither tutor nor curator of any minors, interdicted persons, or absentees.

And therefore personally came and appeared and intervened to this act the said Mistress Jeanne Marie Justine Durell, wife of said Avegno, and of lawful age, who, being herein duly authorized and assisted by her said husband, took cognizance of the foregoing act of mortgage, which I, notary, carefully read and explained to her, and having so done, she declared that it was her intention not only to ratify said mortgage, but to make renunciation of all rights she has by mortgage or otherwise on the property so mortgaged, upon which I, notary, declared to her separately and apart from her said husband, and out of his presence, that by the laws of this State she possessed a general mortgage on all the property of her said husband, and upon the community, in case she should renounce thereto: 1st. For the restitution of her dower and the reinvestment of dotal property brought by her in marriage. 2d. For the restitution of dotal property by her acquired during marriage by inheritance, donation, or otherwise. 3d. For indemnity against all debts contracted or which she may hereafter contract with her said husband. 4th. For such of her paraphernal property and funds as may have been alienated by her said hvsband, or of which he has had or may have the administration or enjoyment, or of which he may otherwise have benefitted. 5th. For nuptial presents made to her by her said husband or others. That in making her intended renunciation she would deprive herself irrevocably and forever of all rights of reclamation against said property, whether under mortgage privilege or otherwise. Whereupon the said wife declared that she still persisted in the intention she had announced to ratify said act of mortgage, and to dispossess herself of all rights and liens which she has upon said property, whether by marriage contract, dower, donation, or otherwise; and the said husband being now again present before me, and authorizing his said wife, she again declared that she does hereby formally renounce henceforth and forever all and singular her said rights, and transfer the same

to the said mortgagee, his heirs and assigns; that she and they shall and will at all times acknowledge the validity of the present mortgage, and of the renunciation she now makes of all rights which she has or may have in and to the property so mortgaged, and that neither she nor they shall ever seek to oppose or impair the force of this act, hereby renouncing the benefit of all laws, privileges, and customs of which she might avail herself, or which are in her favor in the premises.

Done and passed at New Orleans, the third day of April, 1862, in presence of James Fahey and Paul Augrain, witnesses residing in this city, who have signed their names with the said ap-
107 pearers, and me, notary, after reading thereof.

(Sig.) BERNARD AVEGNO.
" JUSTINE B. AVEGNO.
(Sig.) I. C. HARRIS.
JAMES FAHEY.
PAUL AUGRAIN.
S. MAGNER, *Not. Pub.*

A true copy.
New Orleans, March 6th, 1865.
(Sgd.) S. MAGNER,
Not. Pub.

Document E, Offered by Chs. Morgan on day of trial, July 10th, 1865.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that on this 17th day of May, 1864, before me, Selim Magner, a notary public, duly commissioned and sworn in & for the city of New Orleans, & parish of Orleans, personally came & appeared Israel C. Harris, of this city, a loyal citizen, who declared that he is holder of six several promissory notes, drawn by Bernard Avegno to his own order, & by him endorsed, dated New
108 Orleans, the 3d of April, 1862, three for the sum of $10,833.33⅓ each, payable respectively at one, two, & three years; one for $650, payable in one year; one for $1,300, payable in two years; & one for $1,950, payable in three years, all domiciliated at the Louisiana State Bank in this city, & stipulating to bear interest at the rate of 8 per cent. per annum from maturity till paid; which notes are paraphed by me, notary, on the 3rd of April, 1862, & secured by mortgage granted by said Bernard Avegno in favor of said Harris, by act passed before me on the third of April, 1862, on certain property fully described in said act, to which reference is hereby specially made.

That said notes have been negotiated by Mr. Charles Morgan, of New York, who has paid unto him, said Harris, the full amount of said mortgage, say thirty-six thousand four hundred dollars, together with all interest due up to this day on the notes already due.
109 Now, therefore, for & in consideration of the payment so received by him, said Harris, for the amount of said notes, he does, by these presents, without any warranty on his part or re-

course against him, transfer, assign, set over, & deliver unto said Charles Morgan, herein represented by his attorney-in-fact, Mr. James Rentoul, of New York, duly appointed by an act of procuration, deposited in my office by act under date of the 3d current present, acknowledging possession & accepting for the said Charles Morgan, his heirs & assigns, the above-described 6 promissory notes, & he does hereby subrogate the said Charles Morgan to all the rights, actions, liens, privileges, & remedies & mortgages which he, said Harris, has as well against the said Bernard Avegno as against the property mortgaged in & by said act of the 3d April, 1862, hereby authorizing the said Charles Morgan to exercise the said
110 rights, actions, liens, privileges, remedies, & mortgages in the same manner as he, the said Harris, could or might do as mortgagee aforesaid.

Done & passed in my office, at New Orleans aforesaid, on the day, month, & year first before written, in the presence of Edward G. Gottschalk & Robert I. Preaux, competent witnesses, who signed these presents with the said appearers and me, notary, after reading thereof.

The U. S. internal revenue tax on the amount of this subrogation, being thirty-seven thousand five hundred & forty-nine dollars & fifty-seven cents, and amounting to the sum of $18.80, has been paid as per hereto attached U. S. stamps.

(Signed) I. C. HARRIS.
J. RENTOUL.

E. G. GOTTSCHALK.
R. I. PREAUX.

S. MAGNER, *Not. Pub.*

A true copy.
New Orleans, 6 March, 1865.
[SEAL.] (Sig.) S. MAGNER,
Not. Pub.

Stamp.

111 Doc. F.

Power of Attorney from Chs. Morgan to Israel C. Harris, offered on trial July 10th, 1865, by Charles Morgan, Intervenor.

Know all men by these presents that I, Charles Morgan, of the city & State of New York, have made, constituted, and appointed, & by these presents do make, constitute, & appoint Isra-l C. Harris, of the city of New Orleans & State of Louisiana, my true & lawful attorney, for me & in my name, place, & stead, to act in any manner he may elect in order to obtain payment of six several promissory notes made, su-scribed, & endorsed by Bernard Avegno, dated at the said city of New Orleans on the 3d day of April, 1862, viz, three for $10,833.33⅓, each payable in one, two, & three years, respectively; one for $650, payable in one year; one for $1,300, payable in two years,

& one for $1,950, payable in three years, at the La. State
112 Bank, in said city of New Orleans, and all bearing 8 per cent. interest per annum from maturity until paid; which notes are secured by a mortgage given by said Avegno to said Harris bearing even date with said notes on four lots of ground, with the buildings & improvements thereon, situated in 1st district of the said city of New Orleans, in the square bounded by New Levee, Fulton, Gravier, & Poydras streets, designated by the Nos. 9, 10, 11, & 12 on a plan drawn by Hugh Grant, surveyor, on the 12th day of Jan'y, 1852, deposited in the office of the late H. B. Cenas, notary, in said city; which mortgage, with the notes as above described, were assigned by the said Harris to me on the 17th day of May, 1864, by an instrument deposited in the office of Selim Magner, notary, in said city of New Orleans.

And I hereby empower my said attorney to present on my
113 behalf my claim for the amount of said notes, with the accrued interest thereon (& all expenses for protesting said notes, & all other expenses pertaining thereto, incurred or that may be incurred on account of the non-payment of the same, no part of the principal or interest having been paid), whenever he may deem it advisable so to do, & to receive said amount in my name & behalf, or to protect & secure my claim to said amount in such manner as he may elect in any court or elsewhere in any proceeding that may be had in reference to said property or to said mortgage on said property or to said notes. And for further description of said notes or said mortgage, reference is hereby made to the original of said mortgage, deposited in the office of said Selim Magner, in the said city of New Orleans, hereby giving & granting unto my said attorney full
114 power & authority to do & perform all & every act & thing whatsoever requisite & necessary to be done in & about the premises as fully to all intents & purposes as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying & confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand & seal, the 25th day of March, in the year 1865.

(Sig'd) CHS. MORGAN. [SEAL]

Signed & delivered in presence of—
(Signed) JOHN BISSELL.
ROB. N. CLARK.

STATE, CITY, & COUNTY OF NEW YORK, *ss:*

I, John Bissell, a commissioner for the State & resident in the city of New York, legally appointed by the Governor of the State of Louisiana to take testimony, acknowledgments, &c., to be used or recorded in that State, & qualified, do, under my hand &
115 official seal, certify that on this 25th day of March, 1865, before me personally appeared Charles Morgan, to me known to be the same person described, & who executed the annexed instru-

ment, & acknowledged the same to be his free act & deed for the purposes therein mentioned.

[SEAL.] (Signed) JOHN BISSELL,
Commissioner for La. & Not. Public.

Hearing of Cause. Default & Submission.

JULY 10TH, 1865.

THE UNITED STATES
vs.
SEVEN LOTS OF GROUND, THE PROPERTY OF B. AVEGNO. } 7972.

This cause came up for trial; district attorney for libellants; Miles Taylor, G. Schmidt, H. F. Deblieux, & J. Lambert for intervenors; when, on motion of the district attorney, & on showing to the court that the delay allowed by law has expired, and that no defence
116 has been filed, after due monition & proclamation—

It is ordered that all persons interested in the property seized, except those that have intervened herein, be pronounced in contumacy & default, & the libel adjudged & taken *pro confesso*. And after hearing the pleadings & the evidence offered by the respective proctors the court took time to advise.

Extract from the Minutes. Decree of Condemnation and Dismissal of the Intervention of Charles Morgan, &c., &c. July 14th, 1865.

UNITED STATES
vs.
SEVEN LOTS OF GROUND, Property of Avegno. } 7972.

For the reasons orally assigned by the court it is ordered, adjudged, and decreed that the seven lots of ground, with the buildings & improvements thereon, the property of Bernard Avegno, fully described in the libel of information on file (with the
117 exception of the lot claimed by Ralli Benachi & Co.), be, and the same are hereby, condemned as forfeited to the U. States.

It is further ordered that the clerk of this court issue a writ of *venditioni exponas* to the marshal of the district, returnable on the 1st Sept., 1865, & that upon the return thereof the proceeds be distributed according to law.

It is further adjudged & decreed that the claim of the Citizens' Bank of Louisiana be recognized as stated in their intervention, & that the lot of ground, with the buildings thereon, situate in the 2d district, in sq. No. 17, bounded by St. Peter, Bourbon Dauphin, & Orleans Sts., be sold, together with the forty-five shares of the said bank, to pay & satisfy the claim of said bank, on the following terms & conditions, to wit:

The purchaser to assume the position & all the liabilities
118 of a stockholder of said bank for the amount of the said 45 shares of stock, & to furnish in part payment of the price of adjudication to said bank his stock note for the sum of $845, payable on the 1st March, 1866, renewable according to the charter of

said bank & its amendments, said note to be duly identified with the marshal's deed of sale, and to assume in said deed the mortgage & pledge assumed & granted by said Avegno on the aforesaid lot of ground, in an act passed before Amedeé Ducatel, notary, on 14th Dec'r, 1860, & in another act before the same notary on 3d Jan'y, 1861, & to pay the balance of the price in cash. And it is further decreed that out of the balance thus paid the said Citizens' Bank recover, with privilege & mortgage on said lot of ground, the sum of $135, amount of three instalments of the stock loan overdue, with 10 per cent. interest on $845 from 1st March, 1863, till day of
119 sale, & the further sum of $62.75 for premium of insurance paid, the purchaser further to pay interest in advance at 6½ per cent. on the amount of the stock note given as aforesaid from the day of sale to the said 1st March, 1866.

It is further adjudged & decreed that there be judgment in favor of W'd'w William Guesnard for the sum of three thousand six hundred and twenty-four dollars, with 7 per cent. interest on $906 from 14th Dec'r, 1860, to 14 Dec'r, 1862, and 8 per cent. from the latter date till paid; 7 per cent. interest on $906 from 14 Dec'r, 1860, to 14 Dec'r, 1863, & 8 per cent. thereafter till paid; 7 per cent. interest on $906 from 14 Dec'r, 1860, to 14 Dec'r, 1864, & 8 per cent. thereafter till paid; 7 per cent. interest on $906 from 14 Dec'r, 1860, to 14 Dec'r, 1865, & 8 per cent. thereafter till paid, with privilege & mortgage on the proceeds of a lot of ground situate in the 2d district on St. Peter street, between Bourbon & Dauphin streets, having a front of about 30 feet on St. Peter street, by a depth of about 70 feet,
120 & more fully described in the notorial act on file & made part hereof. It is further adjudged and decreed that there shall be judgment in favor of Ralli Benachi & Co., recognizing them the *bona fide* & lawful owners of the lot of ground in the square bounded by Fulton, Front, Lafayette & Girod streets, designated by the No. 15, on a plan by Hugh Grant, & more fully described in the notorial act on file, & that so far as said lot is concerned the libel be dismissed & the seizure released.

It is further adjudged and decreed that the interventions of Charles Morgan & William Lorenzon, who claim proceeds of the libelled property, by virtue of acts of mortgages executed by the defendants on 3d & 4th April, 1862, which cannot be acknowledged, be dismissed with costs, reserving the right to the proctors of the rejected claims to make further argument herein on Friday, 21st instant, at 11 a. m.

121 Judgment rendered July 14th, 1865.
Judgment signed 11th Aug., 1865.

(Sig.) E. H. DURELL, *Judge.*

Hearing of Further Argument July 21st, 1865.

UNITED STATES
vs.
SEVEN LOTS OF GROUND, Property of B. Avegno. } 7972.

This cause came up on the claims of the mortgagees rejected in

the judgment, 14 instant, & pursuant to the privilege extended to the proctors.

G. Schmidt for Wm. Lorenzon; Miles Taylor for Charles Morgan; J. N. Lea now intervening for Mrs. Pritchard; district attorney for libellants: When, after hearing argument, it is ordered that Wm. Lorenzon be permitted to prove that his mortgage & claim is the renewal of a previous mortgage; that time be granted to
122 Mrs. Pritchard to prove & substantiate the allegations of her intervention, & that all her rights be reserved in the premises; & with regard to the claim of Charles Morgan, the court took time to consider.

Extract from the Minutes. Order maintaining the Judgment dismissing Chas. Morgan's Intervention.

AUG. 1ST, 1865.

THE UNITED STATES
vs.
7 LOTS OF GROUND, Property of B. Avegno. } 7972.

For reasons orally assigned it is ordered & decreed that the judgment dismissing the intervention of Charles Morgan be maintained, with costs.

Petition of Appeal. Filed Aug. 4th, 1865. *Extract from the Minutes.*

U. S. D. C't, E. D. of La.

THE UNITED STATES
vs.
SEVEN LOTS OF GROUND, Property of B. Avegno. } 7972.

123 To the honorable the district court of the United States, east. dist. of Louisiana:

The petition of Charles Morgan, a loyal citizen of the United States, residing in the city & State of New York, a mortgage creditor of the said Bernard Avegno, & a claimant & petitioner intervening in the above-entitled cause, for the purpose of enforcing his rights of mortgage against four certain lots & the improvements thereon, the property of the said Bernard Avegno, libelled herein, respectfully represents that a final judgment or decree was rendered on the 14th day of July, 1865, in the above-entitled cause, rejecting his said claim to a mortgage on said four lots, the property of the said B. Avegno; that petitioner is aggrieved by the said final judgment or decree which he believes to be erroneous; that the matter in controversy exceeds thirty thousand dollars in value, & that he is in-
124 formed & believes that he is entitled to have a suspensive appeal allowed him from the said final judgment or decree, in the said cause to the next circuit court to be held in the said eastern district of Louisiana, on giving good & sufficient security in such sum as may be fixed by the court.

Wherefore your petitioner prays that he may be allowed an appeal

from the said final judgment or decree to the next circuit court to be held in the said eastern district of Louisiana, on his giving good & sufficient security according to law, in the sum fixed by the court; that a transcript of the record and of all the proceedings in the cause, duly authenticated, may be sent up to the said circuit court, & that the libellants may be duly cited to appear before the appellate court.

Petitioner further prays for all & general relief.

(Sig.) MILES TAYLOR,
Att'y for Petitioner.

125 *Order of Appeal.*

Let the four lots of ground, with buildings, upon which the intervenor claims a privilege & mortgage, be appraised by Heartt & Hill, the real estate appraisers of this court, for the purpose of ascertaining its value, & let a suspensive appeal be granted to said intervenor, returnable to the circuit court of the United States for the 6th circuit & east. dist. of La. on the 1st Monday of November next, upon his giving bond with good & solvent security, conditioned as the law directs, in a sum exceeding by one-half the appraised value thereof, & upon paying costs of appraisement.

August 4th, 1865.

(Sig.) E. H. DURELL, *Judge.*

Notice to Appraisers.

U. S. Dist. Court, East. Dist. of La.

UNITED STATES
vs.
THE PROPERTY of B. AVEGNO. } 7972.

To H. G. HEARTT & S. L. HILL:

126 Take notice that you have this day been appointed appraisers for the purpose of ascertaining the value of the property libelled in this case, & you are to file the report of your appraisement within the shortest possible delay.

By order of court.

New Orleans, Aug. 4th, 1865.

(Signed) K. LOEW, *D'y Cl'k.*

4 lots are to be appraised. You must come into court & examine.

Service.

Received August 5th, 1865, & on the same day, month, & year served a copy of the within notice on the appraisers, Heartt & Swain, by leaving it at their office, in the hands of their clerk.

(Sig'd) J. J. OREIS,
D'y U. S. Marshal.

Aug. 7th, 1865.

Appraisement. Filed Aug. 11th, 1865. United States Appraisers' Report Confiscated Property, &c.

127

UNITED STATES
vs.
SEVEN LOTS OF GROUND, Property of B. Avegno. } 7972.

To the hon. dist. court for the eastern dist. of La.:

We, the undersigned, appraisers to this hon. court, duly appointed & sworn, have the honor to report that on the 8th day of August, 1865, we proceeded to inspect the below described property for the purpose of ascertaining its value, &, after a careful & thorough examination, find that the present cash value is as set opposite the property below. Four certain lots of ground situate in the first district of this city, in square No. 15, bounded by New Levee, Fulton, Gravier, & Poydras streets, and designated by the Nos. 9, 10, 11, & 12, as per plan of Hugh Grant, surveyor, deposited in the office of H. B. Cenas, not. pub., dated Jan'y 12, 1852, each lot measuring 24 feet six inches, 3 lines front

128 on New Levee street, and 22 feet 8 inches & 3 lines front on Fulton street, by a depth as-follows:

Lot No. 9, 118 feet 7 inches and 2 lines on the side of lot No. 8, & 118 feet 5 lines on the side of lot No. 10; lot No. 10, 118 feet 5 lines on the side of lot No. 9, & 117 feet 6 inches & 3 lines on the side of lot No. 11; lot No. 11, 117 feet 6 inches 3 lines on the side of lot No. 10, and 116 feet 11 inches 3 lines on the side of lot No. 12; lot No. 12, 116 feet 4 inches 6 lines on the side of lot No. 13. Acquired by purchase from Joseph M. Laborde, curator of the estate of J. T. L. I. Burda, and Joseph Martinez Campo, executor of the last will of Angel Xiques, for account of the two successions, as per act passed before Theo. Guyol, notary public, dated February 23, 1860.

Cost $37,000 in 1860.

3 stores are one story high & 1 store is 2 stories high.

For the 4 stores $25,000.

(Sig.) H. G. HEARTT.
(Sig.) SAM'L L. HILL.

129 *Appraisers' Bill. Filed August 11th, 1865. Confiscated Property*

U. S. Dist. Court. Appraisers' Depart.

UNITED STATES
vs.
7 LOTS OF GROUND, Property of B. Avegno. } 7972.

To appraisers' office, Dr.

For examination H. G. Heartt & S. L. Hill, appraisement $25,000 at 1 per cent. on property of Bernard Avegno---------- 250

Appeal Bond. Filed 17th Aug., 1865.

Dist. Court of the United States. In Admiralty.

UNITED STATES
vs. } 7972.
7 LOTS OF GROUND, Property of B. Avegno.

Know all men by these presents, that we, Ch's Morgan, by I. C. Harris, agent, in the sum of $40,000, as principal, and Thos. N. Blake & Wm. H. Thomas as sureties, are held and firmly bound unto
130 the United States in the sum of twenty thousand dollars each surety, making an aggregate sum of $40,000, to be paid to the said United States; for the payment of which, well & truly to be made in lawful money of the United States, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at New Orleans, the 17th Aug., 1865.

Whereas the above-named Ch's Morgan, intervenor, has appealed to the next term of the circuit court of the United States for the 6th circuit and eastern dist. of La. from a final judgment of the district court of the United States for said district, rendered against him dismissing his intervention on the 14th July, 1865, in the above-entitled cause:

Now, therefore, the condition of this obligation is such, that
131 if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs & satisfy whatever judgment may be rendered against him if he fails to make his appeal good, then this obligation to be void; otherwise the same shall be and remain in full force and effects.

(Signed) CH'S MORGAN, [L. S.]
P'r I. C. HARRIS.
(Signed) T. N. BLAKE. [L. S.]
(Signed) WM. H. THOMAS. [SEAL.]

Signed, sealed, and delivered in presence of—
(Signed) K. LOEW; *D'y Cl'k.*

Citation of Appeal.

Eastern District of Louisiana, the United States of America.

UNITED STATES
vs. } 7972.
7 LOTS OF GROUND, Property of B. Avegno.

To R. Waples, Esq., U. S. Att'y, Greeting:

You are hereby cited and admonished to be and appear before the circuit court of the United States for the 6th circuit and
132 eastern district of Louisiana at its next term, to be holden in the city of New Orleans, State of Louisiana, on the 1st Monday of November next, to answer the appeal taken by Ch's Morgan, intervenor in this cause, and you show cause then and there, if any

there be, why the judgment rendered against the said intervenor should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. H. Durell, judge, this 4th day of August, in the year of our Lord 1865, and the 90th of the American Independance.

(Signed) E. H. DURELL, *Judge.*

Received August 7th, 1865, and on the 8th day of same month & year served a copy of this citation on Rufus Waples, Esq., U. S. district attorney, personally, at his office in the custom-house building in this city.

(Signed) J. J. PRIES,
D'p'y U. S. Marshal.

133 *Agreement Relative to Appeal. Filed Aug. 18th,* 1865.

NEW ORLEANS, *August 9th,* 1865.

UNITED STATES
vs. } 7972.
7 LOTS OF GROUND, Property of B. Avegno.

On Appeal by Charles Morgan.

For the purpose of simpliflying the record it is hereby agreed that the clerk shall omit from the transcript of appeal all proceedings & documentary evidence not relating to or affecting the intervention of the above-named appellant, Charles Morgan.

(Signed) RUFUS WAPLES,
U. S. Att'y.
" MILES TAYLOR.

The writ of *venditioni exponas* issued to the marshal Aug. 11, '65, not yet returned.

DISTRICT COURT OF THE U. STATES, *Eastern Dist. of Louisiana:*

I certify that the foregoing pages do contain a correct &
134 complete transcript of all the proceedings had, documents filed, & evidence adduced on the trial of the case of the U. S. *vs.* Seven lots of ground, the property of B. Avegno, No. 7972 of the docket, with the exception of such parts thereof as do not relate to or affect the intervention of Chas. Morgan, which, under the agreement on file, have been omitted from the transcript.

In testimony whereof, I hereto set my hand & the seal of court at New Orleans, this 5th day of October, A. D. 1865, & the 90th year of the American Independance.

[SEAL.] (Signed) K. LOEW, *D'y Cl'k.*

Motion to Dismiss Appeal. Filed Feb'y 6th, 1871.

THE UNITED STATES
vs.
7 LOTS OF GROUND, Property of B. Avegno. } 3651.

On appeal from district court.

On motion of J. R. Beckwith, U. S. dist. att'y, and on sug-
135 gesting to the court that the transcript and record of proceedings in this cause does not disclose the judgment and decree of the district court complained of and sought to be reversed in this court by appeal to have been a decree or judgment in any proceeding in equity or admiralty, but to have been in all things a judgment at law in a proceeding at law—

It is ordered that Charles Morgan, the appellant therein, show cause, on Friday, the 10th, at 11 a. m., why the appeal taken by him in this cause should not be dismissed with costs.

Decree.

Circuit Court of the U. States, Fifth Circuit and Eastern District of Louisiana. November Term, A. D. 1871.

NEW ORLEANS, *Saturday*, 30 *day of March*, 1872.

Court met pursuant to adjournment.

Present: The Honorable W. B. Woods, presiding judge.

136 UNITED STATES
vs.
PROPERTY OF B. AVEGNO. } No. 3651.

For reasons orally assigned, it is ordered that the rule taken by the United States on 6th February, 1871, be made absolute, and that the appeal taken in this cause be dismissed with costs.

Decree rendered March 30th, 1872.

Decree signed April 4th, 1872.

(Signed) W. B. WOODS, *Judge.*

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans this 31st day of May, 1881.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Petition of Appeal. Filed April 13th, 1872.

U. S. Circuit Court.

THE UNITED STATES
vs.
SEVEN LOTS OF GROUND, Property of B. Avegno. } No. 3651.

137 On appeal from the district court of the United States for the eastern district of La.

To the hon. the circuit court of the U. S. for the dist. of La.:

The petition of Charles Morgan, a citizen of the U. S., residing in the city & State of New York, a mortgage creditor of the said Bernard Avegno & a claimant & petitioner intervening in the above-entitled cause, for the purpose of enforcing his rights of mortgage against four certain lots & the improvements thereon, the property of the said B. Avegno, libelled in said cause, respectfully represents:

That a final judgment or decree having been rendered against him by the district court of the United States for the eastern district of Louisiana, in the said cause, on the 14th of July, 1865, he filed his petition in the said district court, praying for a sus-
138 pensive appeal from the judgment or decree aforesaid; that a suspensive appeal was allowed him on his giving bond with good & sufficient security, conditioned according to law, in the sum of forty thousand dollars ($40,000.00); and that the said appeal was prosecuted & the transcript of the record of the lower court filed in this court according to law.

And petitioner further represents that there was a final judgment or decree rendered by this court on the 30th day of March & signed on the 4th day of April, 1872, dismissing the said appeal; that petitioner is aggrieved by the said final judment or decree, which he believes to be erroneous; that the matter in controversy exceeds thirty thousand dollars in value, and that he is informed & believes that he is entitled to have a suspensive appeal allowed him from the said final judgment or decree in the said cause to the Supreme Court of the United States on giving good & sufficient
139 security in such sum as may be fixed by the court.

Wherefore petitioner prays that he may be allowed an appeal from the said final judgment or decree to the Supreme Court of the United States on his giving good & sufficient security according to law in the sum fixed by the court; that a transcript of the record & of all the proceeding in the cause duly authenticated may be sent up to the said Supreme Court of the United States, & that the lbellants & appellees may be cited to appear before the appellate court.

Petitioner further prays for all & general relief.

(Signed) MILES TAYLOR,
For Charles Morgan.

Order.

An appeal is allowed in this case as prayed for, returnable to the Supreme Court of the United States on the first Monday of
140 December next, the appellant giving bond in the sum of forty thousand dollars, with good and solvent security, conditioned as the law directs.

New Orleans, April 13th, 1872.

(Signed) E. H. DURELL, *Judge.*

Appeal Bond. Filed April 13th, 1872.

THE UNITED STATES
vs.
SEVEN LOTS OF GROUND, Property of B. Avegno. } 3651.

Chas. Morgan, Intervenor & Appellant.

Know all men by these presents, that we, Charles Morgan, as principal, & Chas. A. Whitney & A. C. Hutchinson as securities, are held and firmly bound unto the U. S. in the full & just sum of forty thousand dollars, to be paid to the said U. S., their certain attorney, executors, administrators, or assigns, to which payment, well & truly to be made, we bind ourselves, our heirs, executors, and admin-
141 istrators jointly & severally by these presents. Sealed with our seals and dated this thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in & for the dist. of Louisiana, in a suit depending in said circuit court, wherein the U. S. were plaintiffs and 7 lots of ground, property of Bernard Avegno, were defendants, and Charles Morgan was appellant as a mortgage creditor & claimant, judgment was rendered against the said Chas. Morgan, mortgage creditor and intervenor, the appellant and the said Chas. Morgan having obtained an appeal and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said U. S., admonishing the U. S. to be and appear at a Supreme Court of the U. S. to be
142 holden at Washington the first Monday of December next: Now the condition of the above obligation is such that if the said Chas. Morgan shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force & virtue.

(Signed) CHARLES MORGAN. [L. S.]
" CHAS. A. WHITNEY. [L. S.]
" A. C. HUTCHINSON. [L. S.]

Approved.

(Signed) E. H. DURELL, *Judge.*

Mandate of the Supreme Court. Entered and Filed May 22d, 1874.

UNITED STATES
vs.
7 LOTS OF GROUND, Property of B. Avegno. } 3651.

On intervention of Chas. Morgan, an appeal having been taken in this case to the Supreme Court of the United States, the
143 mandate of said court was this day filed, & on motion of J. R. Beckwith, Esq., U. S. att'y, ordered to be recorded, & it is in the words following, to wit:

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and seventy-three, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel. On consideration whereof, the court being equally divided in opinion, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

4TH MAY, 1874.

CLERK'S OFFICE, *ss:*

I hereby certify the foregoing bond of appeal and mandate of the Supreme Court are true and correct copies of the original thereof in said cause. Witness my hand and seal of said court, at
144 New Orleans, La., this 23d day of May, A. D. 1881.
[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

DOCUMENT "C. C."—*Filed May 3d*, 1881.

U. S. Supreme C't.

MORGAN, Intervenor,
vs.
UNITED STATES. } U. S. D't C't, 7972. U. S. C't C't, 3651.

The proceedings show a libel of information under the cap. & aban'd prop'y act against, *int. al.*, 4 lots ground in sq. 15, 3 stores of one story and one store 2 stories high, appraised together at $25,000, property of B. Avegno. Morgan claimed a mortgage right on the proceeds of sale under the judgment of dist. court, by virtue of acts passed Ap. 3 & 4, 1862, he being a citizen of New York. His intervention was dismissed July 14, 1865, and he appealed to c't c't.
His appeal was dismissed by the c't on the ground that
145 the libel was in all respects a suit at law and not in equity or admiralty. This view was sustained and appeal dismissed March 30, 1872. Then came the appeal to the U. S. Supreme Court, which court, on May 4th, 1874, affirmed the judgment by a divided court.

DOCUMENT E. M.—*Filed May 3d*, 1881.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and District of Louisiana. April Term, A. D. 1875.

NEW ORLEANS, *Wednesday, 12th May*, 1875.

Court met pursuant to adjournment.
Present: The Honorable W. B. Woods, circuit judge.

UNITED STATES
vs.
7 LOTS OF GROUND, Property of B. Avegno. } 3651.

146 By consent of parties it is ordered by the court that the following agreement be spread on the minutes in said cause, viz

In the Circuit Court of the U. S. for the Dist. of Louisiana.

UNITED STATES *vs.* BERNARD AVEGNO.

On appeal from the district court of the U. S. for the eastern district of Louisiana.

The intervention filed by Charles Morgan, claiming under a mortgage executed by Avegno and wife on the 3rd April, 1862, is withdrawn, and so much of the judgment as passes upon the effect and validity of said mortgage is hereby set aside and released, but this is not to effect any discharge of legal costs incurred by reason of said intervention.

The agreement is to be entered of record, and become operative when approved by the Attorney General of the United States.

New Orleans, 1st June, 1874.

147 (S'g'd) P. PHILLIPS,
For Charles Morgan.
" J. B. BECKWITH,
U. S. Att'y.

Approved.
(S'g'd) C. H. HILL,
Assistant Att'y General.

CLERK'S OFFICE:

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, this 14th day of May, 1875.

[SEAL.] (Sig'd) F. B. VINOT,
D'y Clerk.

Record No. 5279. *Filed May* 3*d*, 1881.

Petition Filed June 25*th*, 1867.

Circuit Court of the United States:

CHARLES MORGAN
vs.
BERNARD AVEGNO. } 5279.

To the hon. the circuit court of the United States, fifth circuit district of Louisiana:

The petition of Charles Morgan, a citizen of the State of
148 New York, residing in the city of New York, respectfully represents that Bernard Avegno, a citizen of the State of Louisiana, residing in the city of New Orleans, is indebted to your petitioner in the sum of thirty-eight thousand and sixty-nine dollars & eighty-eight cents ($38,069.88), with interest at the rate of eight per cent. per annum on the sum of $11,483.33⅓ from the 3d of April, 1863; $12,133.33⅓ from the 3d of April, 1864, and on the sum of $12,783.33⅓ from the 3d of April, 1865, and five per cent. in addition on the total amount due, and $11.50 costs of protests for this, to wit: That by public act passed on the 3d day of April, 1862, before Selim Magner, a notary public in and for the city
149 and parish of New Orleans, duly commissioned and sworn, an authentic copy of which is herewith filed, the said Bernard Avegno acknowledged himself justly and truly indebted to Israel C. Harris, of the city of New Orleans, in the full sum of thirty-six thousand four hundred dollars, for which he made and subscribed his six several promissory notes, dated on the said 3d day of April, 1862, to the order of and endorsed by himself, three for the sum of ten thousand eight hundred and thirty-three dollars and thirty-three and one-third cents, each payable, respectively, in one, two, and three years; one for six hundred & fifty dollars, payable in one year; one for thirteen hundred dollars, payable in two years, and one for nineteen hundred and fifty dollars, payable in three years at the Louisiana State Bank, in the
150 city of New Orleans, and bearing interest at the rate of eight per cent. per annum from maturity until paid, which said notes, after having been duly paraphed by the said notary to identify them with the said act, were delivered to the said Israel C. Harris; and that it was further declared by the said Bernard Avegno in the said public act that he bound and obliged himself, and his heirs, to pay and reimburse to the said Israel C. Harris, or the person or persons who might be the holder or holders of the said promissory notes, all lawyers or attorneys' fees, costs, charges, & expenses which might be incurred in the event of the non-payment of the said promissory notes at maturity, which said attorneys' fees were fixed at five per cent. on the amount sued for.

And your petitioner further represents, that to secure the
151 payment of the said notes and the said attorneys' fees, costs, charges, &c., the said Bernard Avegno, in and by the said

public act, for himself & for his heirs, specially mortgaged & hypothecated to the said Israel C. Harris, and to the person or persons who might eventually be the holder or holders of the said six several promissory notes; four certain lots of ground, with all the buildings and improvements thereon, &c., situated in the first district of the city of New Orleans, in the square bounded by New Levee, Fulton, Gravier, and Poydras streets, and designated by the Nos. 9, 10, 11, & 12 on a plan drawn by Hugh Grant, surveyor, on the 12th of January, 1852, and deposited in the office of the late H. B. Cenas, a notary of the city of New Orleans.

Lot No. 9, having 24 feet 6 inches 3 lines front on New
152 Levee street, 22 feet 8 inches front on Fulton street, by a depth of 118 feet 7 inches 2 lines on the side of lot No. 8, and of 118 feet 5 lines on the side of lot No. 10.

Lot No. 10, having 24 feet 6 inches and 3 lines front on New Levee street, 22 feet 8 inches 5 lines front on Fulton street, by a depth of 118 feet and 5 lines on the side of lot No. 9, and of 117 feet 6 inches and 3 lines on the side of lot No. 11. Lot No. 11 having 24 feet 6 inches and three lines front on New Levee street; 22 feet 8 inches and 5 lines front on Fulton street, by a depth of 117 feet 6 inches and 3 lines on the side of lot No. 10, and of 116 feet 11 inches and 3 lines on the side of lot No. 12; and lot No. 12, having 24 feet 6 inches and 2 lines front on New Levee
153 street, 22 feet 8 inches and 5 lines front on Fulton street, by a depth of 116 feet 11 inches and 3 lines on the side of lot No. 11, and of 116 feet 4 inches and 6 lines on the side of lot No. 13, which said property was to remain mortgaged and hypothecated in favor of the said Israel C. Harris, and all holders of the said promissory notes, until the full and final payment of the said promissory notes, in capital and interest, and the payment of the said lawyers and attorneys' fees and such costs, charges, and expenses as the said Israel C. Harris or any holder or holders of the same might incur and pay in the event of the non-payment of the said promissory notes, as aforesaid, as will be seen by reference to the authentic copy of the said public act herewith filed as aforesaid.

154 And your petitioner further represents that by another public act passed before the said Selim Magner, notary public, as aforesaid, in the city of New Orleans, on the 17th day of May, 1864, an authentic copy of which is also filed for reference, the said Israel C. Harris transferred, assigned, set over, and delivered to your petitioner the said six promissory notes for a valuable consideration, as set forth in said public act, that petitioner is now the legal holder and owner of the said notes, and that in the premises the said Bernard Avegno is now bound and liable to pay to petitioner the said sums in said notes specified according to their tenor and effect.

Your petitioner further represents that when the said notes pay-
able in the year 1863 arrived at maturity they were respect-
155 ively presented at the place where they were made payable and payment of the same demanded; that they were not paid, and

were respectively protested for non-payment, as will be seen by reference to the public instruments of protest herein filed, made on the 6th of April, 1863, by the said Selim Magner, a notary public, as aforesaid; that the said notes payable two years after date were in like manner presented where they were made payable on the 17th day of May, 1864, and payment of the same demanded; that they were not paid, and were respectively protested for non-payment, as will be seen by reference to the public instruments of protest herewith filed, made by Edward G. Gottschalk, a notary public, in the city of New Orleans, and the said notes pay-
156 able three years after date were also presented where they were made payable on the — day of ——, and payment of the same demanded; that they were not paid, and were respectively protested for non-payment, as will be seen by reference to the public instruments of protest herewith filed, made by —— ——, a notary public.

Your petitioner further represents that the said Bernard Avegno in the said public act also bound himself not to sell, alienate, or encumber the said property to the prejudice of the said mortgage-, and that if the said promissory notes were not punctually paid at maturity he specially authorized the said mortgagee or any other holder of the same to cause the said property mortgaged as aforesaid to be seized and sold under executory process according
157 to satisfy the said notes, principal, interest, the said lawyers' or attorneys' fees, and all the costs, charges, and expenses incurred under the stipulations of the said act.

And your petitioner further represents that he has incurred various expenses for the protection of the said mortgaged property, and which inured to the benefit & advantage of the said Bernard Avegno, amounting to $1,609.88, and that the said sum is now due.

Your petitioner further represents that the said public act was recorded in the office of the recorder of mortgages in and for the city and parish of New Orleans on the — day of April, 1862; that the said act imports a confession of judgment and contains a mortgage which operates upon and affects the said before-described property, and that petitioner is entitled to have the said
158 property subject to the said mortgage sold to satisfy the said promissory notes, lawyers' or attorneys' fees, and the costs of protest and of suit.

Wherefore your petitioner prays that the said Bernard Avegno may be cited before this honorable court, and that after legal proceedings had he may be condemned to pay to petitioner the said sums of thirty-eight thousand and sixty-nine dollars and eighty-eight cents ($38,069$\frac{88}{100}$), with interest at the rate of 8 per cent. per annum on the sum of $11,483.33$\frac{1}{3}$ from the 3d of April, 1863; on the sum of $12,133.33$\frac{1}{3}$ from the 3d of April, 1864, and on the sum of $12,783.33$\frac{1}{3}$ from the 3d of April, 1865, and five per cent. additional on the total amount sued for, as lawyers' or attorneys' fees, and the said costs of protest and of suit.

And petitioner further prays that the said mortgage may be
159 recognized, and the said before-described property may be decreed subject to the same, and to be sold to satisfy the said judgment.

Petitioner further prays for all and general relief.

(Signed) MILES TAYLOR,
Attorney for Petitioner.

(Endorsed:) I acknowledge legal service of the within contained petition, and waive citation. New Orleans, June 25th, 1867. (Signed) Bernard Avegno.

CLERK'S OFFICE, *ss:*

I hereby certify the foregoing pages to be a true and correct copy of the original petition and acceptance of service thereof, and the waiver of citation of said defendant.

Witness my hand and the seal of said court, at New Orleans, La., this 26th day of May, A. D. 1881.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

160 *Fi. Fa.* (*Alias*).

Circuit Court of the United States for the Fifth Circuit, holding Sessions in and for the District of Louisiana.

The President of the United States to the marshal of the district of Louisiana or his lawful deputy, Greeting:

You are hereby commanded, as you have heretofore been, that you demand from Bernard Avegno the sum of thirty-eight thousand and sixty-nine dollars & eighty-eight cents ($38,069.88), with interest at the rate of eight per cent. per annum on the sum of $11,483.33⅓ from the 3d of April, 1863; on the sum of $12,133.33⅓ from the 3d of April, 1864, & on the sum of $12,783.33⅓ from 3d April, 1865, & 5 per cent. in addition, on the total amount sued for as attorneys' fees, & the sum of $11.50, costs of protest and costs of suit according to
161 the judgment of which a copy is made part of this *alias* writ and the property described in the petition and herein transcribed is also made a part of this writ. Clerk's costs $27, & the costs of this writ —— cash, which Charles Morgan lately recovered by judgment of the circuit court of the United States for the 5th circuit and district of Louisiana; and if the said be not paid on demand, that then you cause the same to be made out of the personal estate of the said Bernard Avegno in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said Bernard Avegno in your district whereof he was owner on the 16th day of July, 1867,
162 into whose hands soever the same may have come; and that you have those moneys before our said court to render to the said Charles Morgan for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 8th day of April, A. D. 1868, and 92d year of the Independence of the U. S.

(Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Cl'k.*

Description of the Property taken from the Plaintiffs' Petition on File.

Four certain lots of ground, with all the buildings and improvements thereon, situated in the first district of the city of New Orleans,
in the square bounded by New Levee, Fulton, Gravier, & Poy-
163 dras Sts., and designated by the Nos. 9, 10, 11, & 12, on a plan drawn by Hugh Grant, surveyor, on the 12th January, 1852, and deposited in the office of H. B. Cenas, late a notary of the city of New Orleans, lot No. 9 having 24 feet 6 inches 3 lines front on New Levee street by a depth of 118 feet 7 inches 2 lines on the side of lot No. 10, lot No. 10 having 24 feet 6 inches & 3 lines front on New Levee St., 22 feet 8 inches 5 lines front on Fulton St., by a depth of 118 feet & 5 lines on the side of lot No. 9, and of 117 feet 6 inches & 3 lines on the side of [lot No. 11]; lot No. 11 having 24 feet 6 inches & 3 lines front on New Levee St., 22 feet 8 inches 5 lines front on Fulton St., by a depth of 117 feet 6 inches & 3 lines
on the side of lot No. 10, & 116 feet 11 inches & 3 lines on
164 the side of lot No. 12, and lot No. 12 having 24 feet 6 inches & 2 lines front on New Levee St., 22 feet 8 inches & five lines front on Fulton St., by a depth of 116 feet 11 inches & 3 lines on the side of lot No. 11, and of 116 feet 4 inches & 6 lines on the side of lot No. 13.

A true copy.

(Signed) D. URBAN, *Cl'k*,
By F. B. VINOT, *D'y Cl'k.*

Marshal's Return.

Received April 8th, 1868, by the U. S. marshal, and on the 11th day of April, 1868, served a copy of the notice of seizure & demand on Bernard Avegno personally, & on the same day, month, & year seized & took into possession the property described in said notice, which is hereto annexed & made a part of this return; but having
been directed by the pl't'ffs' attorney to suspend proceedings,
165 and this writ having expired, I now *the* return the same nothing made. I appointed as keeper of the property seized, according to law, Schmidt & Ziegler, the tenants in possession of the same.

N. O., Nov. 5th, 1868.

(S'g'd) J. J. PREIS,
D'y U. S. Marshal.

Notice of Demand.

In the United States Circuit Court for the 5th Circuit and District of La.

CHARLES MORGAN
vs.
BERNARD AVEGNO. } No. 5279.

To Bernard Avegno, defendant in above-entitled suit:

Take notice that by virtue an *alias* writ of *fieri facias* issued and to me directed in the above-entitled suit, I now demand of you the payment to me of thirty-eight thousand and sixty-nine $\frac{88}{100}$ dollars,
166 together with interest and all costs as per judgment, a copy of which has already been served on you, to secure the payment of which, as well as of all further costs which may accrue in the execution of the above-named writ, I have seized & taken into my possession the following-described property, as also the proceeds or rents arising from the said property, viz: (See description of the property, pages 156 to 158, be the same more or less.) And unless the amount of said demand and interest and all costs accrued and to accrue be paid to me within three days from the service of this notice, I shall proceed to advertise for sale, according to law, the above-described property and appurtenances in order to satisfy the demands of said plaintiff's claim, interest, & all costs as per judgment.

U. S. marshal's office, New Orleans, April 11th, 1868.
167 (S'g'd) J. J. PREIS,
Deputy U. S. Marshal, Dist. of Louisiana.

Marshal's Return.

Issued April 11th, 1868, and on the same day, month, & year seized and took into my possession the property described herein, and exhibited the writ of *fieri facias*, on the authority of which the said property was seized, unto Bernard Avegno, the defendant in the within-named suit, and served upon him personally a copy of the within notice, at No. 58 Common street, corner of Carondelet street, in this city, at between the hours of 3 & 4 o'clock p. m. of this said 11th April, 1868.

New Orleans, April 11th, 1868.
(Signed) J. J. PREIS,
D'y U. S. Marshal, Dist. of La.

168 *Judgment.*

U. S. Circuit Court.

CHARLES MORGAN
vs.
BERNARD AVEGNO. } 5279.

By reason of the default herein entered on the 8th instant, and of the law and the evidence, it is ordered, adjudged, and decreed that

the defendant, Bernard Avegno, be condemned to pay to Charles Morgan, the petitioner, the sum of thirty-eight thousand and sixty-nine dollars ($38,069.88) and eighty-eight cents, with interest at the rate of eight per cent. per annum on the sum of $11,483.33⅓ from the 3d of April, 1863; on the sum of $12,133.33⅓ from the 3d of April, 1865, and five per cent. in addition on the total amount sued for, as lawyers' or attorneys' fees, and the sum of $11.50, costs of protest and costs of suit.

It is further ordered that the said mortgage granted by the
169 said Bernard Avegno, and contained in the said public act passed before Selim Magner, notary public, in the city of New Orleans, on the 3d day of April, 1862, be recognized, and that the said property described in the petition be declared to be subject to said mortgage to secure the payment of thirty-six thousand four hundred dollars and the interest thereon as aforesaid, and the said five per cent. in addition on the total amount of the same, as lawyers' or attorneys' fees, and the costs of suit.

It is further ordered that there shall be a stay of execution on the said judgment until the first day of November next, 1867, and if the sum of five thousand dollars is paid on account of the said judgment on or before the first day of November, 1867, that then
170 there shall be a further stay of execution on the said judgment to the first day of March, 1868; and if a further sum of five thousand dollars is paid on account of the said judgment on or before the said first day of March, 1868, then there shall be a further stay of execution until the first day of December, 1868, according to the terms of the agreement on file.

Judgment rendered July 11th, 1867.

Judgment signed July 16th, 1867.

(Signed) E. H. DURELL, *Judge.*

Circuit Court of the United States, Fifth Circuit and District of Louisiana.

CLERK'S OFFICE.

To Bernard Avegno:

Please take notice that on the 11th day of July, 1867, judgment was entered in this court in the above-entitled suit, and in the foregoing words and figures.

Witness my hand and seal of said court, at New Orleans,
171 this 24th day of December, A. D. 1867.

[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

Marshal's Return on Plurius Fi. Fa.

Rec'd Nov. 5, 1868, and on the 9th day of November, 1868, I made demand of Bernard Avegno, defendant, personally, at his office, 170 Common St., for the payment of the judgment within set forth, and to secure the payment of the said judgment, I, on the 7th day of November, 1868, took into my possession the property described in the printed advertisement hereto annexed; and the defendant fail-

ing to pay the amount of said judgment, after the legal delay, I caused the said property to be advertised for sale at public auction to the highest bidder, which advertisement appeared in the New Orleans Republican, a newspaper printed & published in the city of
172 New Orleans, on the following days, to wit, November 16th, 21st, & 28th, & December 5th, 12th, & 19th, & 21st, 1868, being full 30 days from the date of the first publication made, & by also advertising the sale of the said property in the New Orleans Advocate, & also by posting notice of said sale on the court-house door, in which said advertisements & notice the day, place, & hour, & terms of sale were fully set forth; and at the place and hour designated in said advertisements, and after having the property duly appraised, and after having read in a loud and audible tone of voice the certificate of the recorder of mortgages bearing upon the same, I began the sale of said property, & offered it at auction to the highest bidder for cash, when, after duly crying the same, it was
173 adjudicated to Charles Morgan, of the city of New York, represented by George Pandely, of New Orleans, for the price & sum of ($50,000) fifty thousand dollars; and the said purchaser, being judgment creditor to more than the amount of his said bid, the purchase price, retains said amount in his hands, and pays the marshal the amount of his costs, as also those of the clerk of court, & also takes upon himself the payment of all taxes bearing upon the said property.

This writ is returned satisfied in part.

New Orleans, March 5th, 1869.

(Signed) JNO. FAHEY,
D'y Marshal.

Deed of Sale. Filed May 3d, 1881.

UNITED STATES OF AMERICA,
District of Louisiana, City of New Orleans:

173½ Know all men that I, F. J. Herron, marshal of the United States for the district of Louisiana, under and by virtue of a *plurius* writ of *fieri facias* issued and to me directed by the circuit court of the United States for the 5th judicial circuit and district of Louisiana, in the suit entitled Charles Morgan *versus* Bernard Avegno and No. 5279 of the docket of said court, did seize and take into my possession according to law, on the 7th day of November, 1868, and notified the defendant in the aforenamed suit, Bernard Avegno personally, on the 9th day of November, 1868, of the seizure of the hereinafter described property, and of the rents due and to be paid therefor by Schmidt & Ziegler, the lessees of the said property.

And all the legal formalities having been previously observed I
174 offered the said property for sale at auction according to law, to the highest bidder for cash, by posting a notice of said sale on the door of the court-house, and by advertising said sale full six times within the space of thirty days, viz., on the 16th, 21st, and 28th days of November, and 5th, 12th, & 19th days of December, 1868, in the New Orleans Republican and the New Orleans Advo-

cate, they being newspapers printed & published in the city of New Orleans; and which said advertisements containing a description of the property to be sold, in which the day, place, hour, & terms of said sale were fully set forth, and which sale was advertised for Monday, the 21st day of December, 1868, at the entrance to the custom-house, between Canal & Custom-house streets, in the second district of the city of New Orleans, at the hour of (12) twelve o'clock at noon, and on which day and at the place and hour set forth in said advertisements, after having had the said property duly appraised according to law, and after having fulfilled all the previous and necessary legal requisites, I commenced the sale of said property by reading in a loud and audible voice the said advertisements, containing a description of said property, the terms of sale, the certified copy of the judgment under which said property was seized & sold, and the official certificate of mortgages bearing upon said property, from which certificate it appears that the following mortgages, and no others, were of record on the official books of the recorder of this parish, viz:

1st. B. 78, fo. 194. The one he granted in favor of Israel C. Harris per act before S. Magner, notary public, dated 3d April, 1862, to secure $36,400.00, interest and costs, recorded 5th April, 1862.

2d. B. D. 5, fo. 582. The general one in favor of his wife by marriage contract, executed by Louis T. Caire, notary, on 24th October, 1846, and recorded 27th October, 1846.

3d. B. D. 6, fo. 105. The general one in favor of his wife, per act of Louis T. Caire, notary, dated 11th July, 1848, recorded 18th July, 1848, by which he took charge of $12,000.00 towards her.

4th. B. P. 1, fo. 391. The drawing privilege.

5th. B. J. M., No. 12, fo. 216. The general one in favor of T. C. Twitchell, resulting from a judgment rendered by the 4th district court in suit No. 18806, for the sum of $1,904.00, with interest stipulated in said judgment and costs of suit, recorded 16th March, 1867.

6th. B. J. M., No. 12, fo. 256. The general one in favor of Edward Byrne, resulting from a judgment rendered by the 5th district court on the 22d April, 1867, in suit No. 17310, for the sum of $1,500.00, with interest as stipulated in said judgment and costs, recorded 4th May, 1867.

7th. B. J. M., 12, fo. 422. The general one in favor of Alfred Marchand, resulting from a judgment rendered by the 4th district court on the 20th day of January, 1868, for the sum of $750.00, with interest stipulated in said judgment and costs, recorded 10th Feb'y, 1868, in suit 20004.

8th. B. J. M., No. 12, fo. 512. The general one in favor of Alfred Marchand, resulting from a judgment rendered by the 5th district court on the 20th April, 1868, in suit No. 19745, for the sum of $1,100.00, with interest stipulated in said judgment and costs, recorded 24 April, 1868.

9th. B. J. M., No. 12, fo. 528. The general one in favor of Charles Morgan, resulting from a judgment rendered by the U. S. circuit court

on the 11th July, 1867, in suit No. 5279, for the sum of $38,069.88, with interest stipulated in said judgment and costs, recorded 6th May, 1868.

10th. B. J. M., No. 12, B. 578. The general one in favor of Samuel Johnson, resulting from a judgment rendered by the 5th district court on the 27th June, 1868, in suit No. 20214, for the sum of $13,403.80, with interest stipulated in said judgment and costs of suit, recorded 2d July, 1868.

11th. B. J., No. 12, fo. 658. The general one in favor of Charles Morgan, resulting from the seizure made under the writ issued
179 by the U. S. circuit court on the 5th November, 1868, in suit No. 5279, for the sum of $38,069.88, with interest stipulated in the judgment rendered and costs of suit, and recorded on the 11th November, 1868.

12th. B. J. M., No. 12, fo. 663. The general one in favor of J. Numa Avegno, resulting from a judgment rendered by the 7th district court on the 9th November, 1868, in suit No. 22, for the sum of $1,712.19⅓, with interest stipulated in said judgment and costs, recorded 16th November, 1868.

13th. B. J. M., No. 2, fo. 1. The general one in favor of this city, resulting from a judgment rendered by the 2d district court on the 9th December, 1864, in suit No. 21047, for the sum of $560.00, with interest stipulated in said judgment and costs of suit, being for taxes of 1863.

14th. B. J. M., No. 2, fo. 6. The general one in favor of this city, resulting from a judgment rendered by the 6th district court
180 on the 1st December, 1864, in suit No. 12029, for the sum of $815.00, with interest stipulated in said judgment and costs, for taxes of 1863.

15th. B. J. M., No. 2, fo. 8. The general one in favor of this city, resulting from a judgment rendered by the 2d district court on the 23d November, 1866, in suit No. 27535, for the sum of $450.00, with interest stipulated in said judgment and costs, for taxes of 1865.

After reading the aforesaid documents and fully setting forth the terms of the lease, I offered for sale the following-described property, subject to the said lease, to Messrs. Schmidt & Ziegler, who are now in occupation of said property, viz:

Four certain lots of ground, with all the buildings and improvements thereon, and rights, ways, hereditaments, and appurtenances thereunto belonging, or any wise appertaining, situated in
181 the first district of this city, in the square bounded by New Levee, Fulton, Gravier, and Poydras Sts., and designated as lots Nos. 9, 10, 11, & 12, on a plan drawn by Hugh Grant, surveyor, on the 12th January, 1852, and deposited in the office of the late H. B. Cenas, a notary of the city of New Orleans, and measuring as follows:

Lot No. 9, having 24 feet 6 inches 3 lines front on New Levee street, 22 feet 8 inches front on Fulton street, by a depth of 118 feet 7 inches 2 lines on the side lot No. 8, and of 118 feet 5 lines on the side of lot No. 10. Lot No. 10, having 24 feet 6 inches 3 lines front on New Levee St., 22 feet 8 inches 5 lines front on Fulton street, by

a depth of 118 feet and 5 lines on the side of lot No. 9, and of 117 feet 6 inches and 3 lines on the side of lot No. 11.

Lot No. 11, having 24 feet 6 inches and 3 lines front on
182 New Levee St., 22 feet 8 inches and 5 lines front on Fulton St., by a depth of 117 feet 6 inches and 3 lines on the side of lot No. 10, and 116 feet 11 inches and 3 lines on the side of lot No. 12; and lot No. 12, having 24 feet 6 inches and 2 lines front on New Levee street, 22 feet 8 inches and 5 lines front on Fulton street, by a depth of 116 feet 11 inches and 3 lines on the side of lot No. 11, and of 116 feet 4 inches and 6 lines on the side of lot No. 13, be the same more or less. When after duly crying the aforesaid property and appurtenances the same was adjudicated, in block, unto George Pandely, of the city of New Orleans, for and on account of Charles Morgan, of the city of New York, he being the last and highest bidder thereon, for the price and sum of ($50,000.00) fifty thousand dollars in cash. But the said purchaser, Charles Morgan, being the first-
183 mortgage creditor to more than the amount of the said purchase price, as appears from the official certificate of mortgage hereinabove set forth, and from the judgment rendered in the aforenamed suit, of which the following is a copy, viz:

Circuit Court of the United States, Fifth Circuit and District of Louisiana. April Term, 1867.

NEW ORLEANS, THURSDAY, *July 11th*, 1867.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, district judge.

CHARLES MORGAN
vs. } 5279.
BERNARD AVEGNO.

By reason of the default herein entered on the 8th instant, and of the law and the evidence, it is ordered, adjudged, and decreed that the defendant, Bernard Avegno, be condemned to pay to Charles Morgan, the petitioner, the sum of thirty-eight thousand and
184 sixty-nine dollars and eighty-eight cents ($38,069.88), with interest at the rate of 8 per cent. per annum on the sum of $11,483.33⅓ from the 3d of April, 1864, and on the sum of $12,783.33⅓ from the 3d April, 1865, on the sum of $12,133.33⅓ from the 3d of April, 1864, and 5 per cent. in addition on the total amount sued for as lawyers or attorneys' fees, and the sum of $11.50 costs of protest and costs of suit. It is further ordered that the mortgage granted by Bernard Avegno and contained in the public — passed before Selim Magner, notary public, in the city of New Orleans, on the 3d day of April, 1862, be recognized, and that the property described in the petition be declared to be subject to said mortgage to secure the payment of thirty-six thousand four hundred dollars, and the interest thereon as aforesaid, and the said five per cent. in addition on the total amount of the same as lawyers or attorneys' fees,
185 and the costs of suit.

It is further ordered that there shall be a stay of execution

on the said judgment until the first day of November next, 1867, and, if the sum of $5,000.00 is paid on account of the said judgment on or before the 1st day of November, 1867, that then there shall be a further stay of execution on the said judgment to the first day of March, 1868, and if a further sum of $5,000.00 is paid on account of said judgment on or before the said first day of March, 1868, then there shall be a further stay of execution until the first day of December, 1868, according to the terms of the agreement on file.

Judgment rendered July 11th, 1867. Judgment signed July 16th, 1867.

(Signed) E. H. DURELL, *Judge.*

The said purchaser has heretofore retained in his hands the
186 full amount of the said purchase price, and has paid the costs of the aforenamed suit, amounting to the sum of six hundred and eighty-one $\frac{10}{100}$ in cash, which, together with the amount of the taxes and the amount of the attorney's fee paid by the said purchaser, also in cash, amounts in toto to the sum of seven thousand three hundred and eleven $\frac{96}{100}$ dollars, which said amount having been paid in cash as a part of, and which being deducted from, the amount of the said purchase price, leaves a balance of forty-two thousand six hundred and eighty-eight $\frac{04}{100}$ dollars to be credited on the writ under which the said property was seized and sold; and the said purchaser's agent aforenamed hath deposited with the U. S. marshal aforesaid evidence of the payment of all the taxes due and unpaid up to the present date and bearing upon said prop-
187 erty, so far as can be ascertained from the official records, the said purchaser's agent hereby accepting, for and in behalf of his principal, Charles Morgan, the said property from the United States marshal, who is by the said purchaser, through said agent, hereby exonerated from the payment of, and held blameless in case further taxes should hereafter be discovered as due and unpaid on the hereinabove-described property.

And the United States marshal aforesaid hath, by this official authorization, directed the recorder of mortgages in and for the parish of Orleans to cancel and annul all mortgages bearing upon the above-described property and recorded subsequent to plaintiff's first mortgage, which was recorded on the 5th day of April, 1862, and which said first mortgage is, by the authorization of the said
188 United States marshal, credited and canceled to the amount of the balance of the purchase price above set forth.

Now, therefore, I, F. J. Herron, the U. S. marshal aforesaid, in consideration of the premises, and by virtue of the laws in such case made and provided, do hereby sell, transfer, assign, convey, and set over unto the said Charles Morgan, his heirs, administrators, executors, and assigns, the aforesaid property and appurtenances, to have and to hold the said property and appurtenances unto the said Charles Morgan, his heirs, administrators, and assigns, to his and their proper use, benefit, and behoof forever.

In testimony of which, I grant these presents under my signature as U. S. marshal aforesaid, in the said city of New Orleans, on this

the 26th day of December, A. D. 1868, and of the Independence of the U. S. of America the ninety-third.

(Signed) F. J. HERRON,
189 *U. S. Marshal for the District of Louisiana.*

Executed in the presence of—
(Signed) J. J. PREIS.
" H. J. SAMSON.

Fifty dollars U. S. internal revenue stamps affixed and cancelled.

CLERK'S OFFICE.

A true copy of the original deed of sale.
New Orleans, January 9th, 1869.
(Signed) D. URBAN, *Clerk.*
By F. B. VINOT, *D'y Cl'k.*

Circuit Court of the United States, Eastern Dist. of Louisiana, *ss:*

CLERK'S OFFICE.

I certify the foregoing to be a true copy of the original deed of sale as the same appears transcribed at pages 298, 299, 300, 301, 302, 303, 304, and 305 of record book of sales, &c., No. 2, of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this 20th day of May, A. D. 1881.

190 (Signed) T. V. COUPLAND,
D'y Clerk.

Notice of Seizure to Schmidt & Zeigler. Filed May 3d, 1881.

OFFICE OF THE U. S. MARSHAL
FOR THE DIST. OF LOUISIANA,
NEW ORLEANS, *November 5th,* 1868.

U. S. C't C't for 5th Jud'l C't *C't.*

CHARLES MORGAN
vs.
BERNARD AVEGNO. } 5279.

To Messrs. SCHMIDT & ZIEGLER,
49, 51, 53, & 55 *New Levee Street:*

Take notice that by virtue of a *plurius* writ of *fieri facias* issued in the above-entitled suit I hereby seize in your hands all the goods, chattels, tennements, rights, credits, moneys, effects, bills of exchange, promissory notes, or property of any kind which you may now have or hereafter have in your possession or under your control as the property of the defendant, Bernard Avegno, but more par-
191 ticularly any balance which you have in your hands for rents of the premises now occupied by you, due or to become due, of whatsoever nature or kind they may consist, and which you will hand over to me on due notice.

And you are hereby made the custodians of the property seized in the above-entitled suit, and in your capacity as such custodian you will keep the same under your immediate charge & control until you are discharged by due course of law.

(Signed) J. J. PREIS,
D'y U. S. Marshal, Dist. of La.

Notice of Seizure to Schmidt & Ziegler, marked "Q 1." Identified with Testimony of W. B. Schmidt. Filed May 3d, 1881.

U. S. Circuit Court.

CHAS. MORGAN
vs. } 5279.
BERNARD AVEGNO.

To Messrs. SCHMIDT & ZIEGLER,
192 49, 51, 53, & 55 *New Levee Street:*

Take notice that by virtue of an *alias* writ of *fieri facias*, issued in the above-entitled suit, I seize in your hands all the goods, chattels, lands, tenements, rights, credits, moneys, effects, bills of exchange, promissory notes, or property of any kind, which you may now have or hereafter have in your possession or under your control, as the property of the defendant, Bernard Avegno, but more particularly any balance which you have in your hands for rents of the premises now occupied by you, due or to become due, of whatsoever nature or kind it may consist, and which you will hand over to me on due notice. And you are hereby made the custodian of the property seized in the above-entitled suit, and in your capacity as such custodian you will keep the same under your express
193 charge & control until you are discharged by due course of law.

(Signed) J. J. PREIS,
Deputy U. S. Marshal, Dist. of La.

In the U. S. Circuit C't, 5th Circuit and District of Louisiana.

CHARLES MORGAN
vs. } 5279.
BERNARD AVEGNO.

To SCHMIDT & ZIEGLER,
Nos. 49, 51, 53, & 55 *New Levee Street:*

Take notice that by virtue of an *alias* writ of *fieri facias*, issued and to me directed in the above-entitled suit, I hereby seize and take into my possession four certain lots of ground, with all the buildings and improvements thereon, in the square bounded by New Levee, Fulton, Poydras, & Gravier streets, in the first district of the city of New Orleans, and numbered 9, 10, 11, & 12, on a plan drawn by Hugh Grant, surveyor, dated 12th January, 1852, deposited in the office of H. B. Cenas, notary public of this city. Said lots are more par-
194 ticularly described in the aforesaid writ of *fieri facias* on file in this office, and are known as Nos. 49, 51, 53, & 55 New

Levee street, and 39, 41, 43, & 45 Fulton street, & are occupied by you, & now seized to satisfy the plaintiff's claim, interest, and all costs as set forth in the copy of the judgment rendered in above-entitled suit on file in this office, and which property I shall hold in my possession until further order of court.

(Signed) J. J. PREIS,
D'y U. S. Marshal, Dist. of La.

Sale of Property. Charles Morgan to Schmidt & Ziegler.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that on this day before me, Edward Barnett, a notary public in and for this city and parish of New Orleans, State
195 of Louisiana aforesaid, duly commissioned and sworn, personally came and appeared Charles Morgan, Esq., of the city, county, & State of New York, who declared that for and in consideration of the price and sum of fifty thousand dollars to him paid in manner hereinafter set forth, he does by these presents grant, bargain, sell, convey, transfer, assign, and set over, with a full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other incumbrances whatsoever, unto Messieurs William B. Schmidt and Francis M. Ziegler, copartners, trading in this city under the style & firm of Schmidt & Ziegler, here present, accepting for themselves, their heirs and assigns, and acknowledging delivery & possession thereof, the following property, situated in the first district of this city, viz:

Four several lots of ground, with the buildings and improvements thereon, & appurtenances thereof, and all the rights,
196 ways servitudes, privileges, and advantages thereunto belonging or in anywise appertaining, situated in the square bounded by New Levee, Fulton, Gravier, & Poydras Sts., designated as lots Nos. 9, 10, 11, & 12, on a plan drawn by Hugh Grant, surveyor, on the 12 of January, 1852, and deposited in the office of H. B. Cenas, late notary in this city, measuring as follows, viz:

Lot No. 9 having twenty-four feet six inches & three lines front on New Levee street, twenty-two feet eight inches front on Fulton street, by a depth of one hundred and eighteen feet seven inches & two lines on the side of lot No. eight, & of one hundred & eighteen feet five lines on the side of lot No. 10; lot No. 10 having twenty-four feet 6 inches & 3 lines front on New Levee street, 22 feet 8 inches & 5 lines front on Fulton street, by a depth of 118 feet & 5 lines on the side of lot No. 9, and of 117 feet 6 inches and 3 lines on the side of lot No. 11; lot No. 11
197 having 24 feet 6 inches & 3 lines front on New Levee, 22 feet 8 inches & 5 lines front on Fulton St., by a depth of 117 feet 6 inches & 3 lines on the side of lot No. 10, & 116 feet 11 inches & 3 lines on the side of lot No. 12, and lot No. 12 having 24 feet 6 inches & 2 lines front on New Levee St., 22 feet 8 inches & 5 lines front on Fulton St., by a depth of 116 feet 11 inches & 3 lines on the side of lot No. 11, & of 116 feet 4 inches & 6 lines on the side of

And you are hereby made the custodians of the property seized in the above-entitled suit, and in your capacity as such custodian you will keep the same under your immediate charge & control until you are discharged by due course of law.

(Signed) J. J. PREIS,
D'y U. S. Marshal, Dist. of La.

Notice of Seizure to Schmidt & Ziegler, marked "Q 1." Identified with Testimony of W. B. Schmidt. Filed May 3d, 1881.

U. S. Circuit Court.

CHAS. MORGAN
vs. } 5279.
BERNARD AVEGNO.

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193 charge & control until you are discharged by due course of law.

(Signed) J. J. PREIS,
Deputy U. S. Marshal, Dist. of La.

In the U. S. Circuit C't, 5th Circuit and District of Louisiana.

CHARLES MORGAN
vs. } 5279.
BERNARD AVEGNO.

To SCHMIDT & ZIEGLER,
Nos. 49, 51, 53, & 55 *New Levee Street:*

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194 ticularly described in the aforesaid writ of *fieri facias* on file in this office, and are known as Nos. 49, 51, 53, & 55 New

Levee street, and 39, 41, 43, & 45 Fulton street, & are occupied by you, & now seized to satisfy the plaintiff's claim, interest, and all costs as set forth in the copy of the judgment rendered in above-entitled suit on file in this office, and which property I shall hold in my possession until further order of court.

(Signed) J. J. PREIS,
D'y U. S. Marshal, Dist. of La.

Sale of Property. Charles Morgan to Schmidt & Ziegler.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that on this day before me, Edward Barnett, a notary public in and for this city and parish of New Orleans, State
195 of Louisiana aforesaid, duly commissioned and sworn, personally came and appeared Charles Morgan, Esq., of the city, county, & State of New York, who declared that for and in consideration of the price and sum of fifty thousand dollars to him paid in manner hereinafter set forth, he does by these presents grant, bargain, sell, convey, transfer, assign, and set over, with a full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other incumbrances whatsoever, unto Messieurs William B. Schmidt and Francis M. Ziegler, copartners, trading in this city under the style & firm of Schmidt & Ziegler, here present, accepting for themselves, their heirs and assigns, and acknowledging delivery & possession thereof, the following property, situated in the first district of this city, viz:

Four several lots of ground, with the buildings and improvements thereon, & appurtenances thereof, and all the rights,
196 ways servitudes, privileges, and advantages thereunto belonging or in anywise appertaining, situated in the square bounded by New Levee, Fulton, Gravier, & Poydras Sts., designated as lots Nos. 9, 10, 11, & 12, on a plan drawn by Hugh Grant, surveyor, on the 12 of January, 1852, and deposited in the office of H. B. Cenas, late notary in this city, measuring as follows, viz:

Lot No. 9 having twenty-four feet six inches & three lines front on New Levee street, twenty-two feet eight inches front on Fulton street, by a depth of one hundred and eighteen feet seven inches & two lines on the side of lot No. eight, & of one hundred & eighteen feet five lines on the side of lot No. 10; lot No. 10 having twenty-four feet 6 inches & 3 lines front on New Levee street, 22 feet 8 inches & 5 lines front on Fulton street, by a depth of 118 feet & 5 lines on the side of lot No. 9, and of 117 feet 6 inches and 3 lines on the side of lot No. 11; lot No. 11
197 having 24 feet 6 inches & 3 lines front on New Levee, 22 feet 8 inches & 5 lines front on Fulton St., by a depth of 117 feet 6 inches & 3 lines on the side of lot No. 10, & 116 feet 11 inches & 3 lines on the side of lot No. 12, and lot No. 12 having 24 feet 6 inches & 2 lines front on New Levee St., 22 feet 8 inches & 5 lines front on Fulton St., by a depth of 116 feet 11 inches & 3 lines on the side of lot No. 11, & of 116 feet 4 inches & 6 lines on the side of

lot No. 13, be the same more or less, being the same property which the said Charles Morgan acquired at a public sale thereof, made by the U. S. marshal for the district of Louisiana, in the suit of Charles Morgan *vs.* Bernard Avegno, No. 5279 of the docket of said circuit court of the U. S. for the fifth judicial circuit and district of Louisiana, & for which the said marshal granted unto him a deed
198 of sale & transfer in due form, under date of the 26th day of December last, 1868, duly recorded in the office of the clerk of said court, in book of sales No. 2, folios 298, 299, 300, 301, 302, 303, 304, & 305, and registered in the conveyance office of this city, in book B, folio 608. This sale is made & accepted for & in consideration of the price & sum of fifty thousand dollars, of which ten thousand dollars have been paid in ready money, & the remaining sum of forty thousand dollars in the four several promissory notes of said purchasers to the order of & endorsed by themselves, each for ten thousand dollars, dated this day, & payable respectively at six, twelve, eighteen, & twenty-four months, with interest at the rate of 8 per cent. per annum from date until paid, which notes, after having paraphed — ne varietur by me, notary public, in order to
199 identify them herewith, have, together with said ready money, been delivered to said seller, who acknowledges the receipt thereof.

And in order to secure the payment of said notes in capital & interest, the said property is hereby specially mortgaged in favor of said seller, & of any other holder or holders thereof, the purchasers hereby binding themselves & their heirs not to alienate or encumber the same to the prejudice of this act. The tax receipts required by law on said property have been exhibited to me, notary, and as relates to those for the year 1868, & the proportion thereof for 1869, they shall be paid by said vendor when collectable. The tax on this instrument has been paid, as per annexed stamps of the internal revenue department of the U. S. of the value of fifty dollars, duly cancelled by me, notary.

The vendor declares that he is neither tutor or curator of
200 minors, interdicted parties, or absentees. By the annexed certificates of the recorder of mortgages and register of conveyances of this parish it appears that said property is free from all incumbrances in the name of said vendor, & that the same has not been alienated by him since his said purchase.

To have and to hold the said property and appurtenances unto the said purchasers, their heirs and assigns, to their proper use and behoof forever. And the said seller for himself and his heirs, the said property & appurtenances to the said purchasers, their heirs, and assigns, shall and will warrant and forever defend against the lawful claims of all persons whomsoever by these presents. And the said vendor does moreover subrogate the said purchasers to all the rights and actions of warranty which he has or may have against his own vendor or against the vendors of his vendor, fully
201 authorizing the said purchasers to exercise the said rights and action in the said manner as he himself might or could have

done. And thereupon personally came & appeared and intervened to this act Mistress Mary Jane Morgan, of lawful age, wife of said vendor, who, being herein duly authorized and assisted by her said husband, took cognizance of the foregoing act of sale, which I, notary, carefully read and explained to her, and having so done she declared that it was her intention not only to ratify said sale, but to make renunciation of all rights she has, by mortgage or otherwise, on the property therein conveyed, upon which I, notary, declared to her separately and apart from her said husband and out of his presence, as it is my duty, that by the laws of this State she possessed a general mortgage on all the property of her said husband, and upon that of the community in case she should renounce thereto—

202 First. For the restitution of her dower and the reinvestment of dotal property brought by her in marriage. Second. For the restitution of dotal property by her acquired during marriage by inheritance, donation, or otherwise. Third. For indemnity against all debts contracted, or which she may hereafter contract with her said husband. Fourth. For such of her paraphernal property and funds as may have been alienated by her said husband, or of which he has had or may have the administration or enjoyment, or of which he may otherwise have benefitted. Fifth. For nuptial presents made to her by her said husband or others.

That in making her intended renunciation she would deprive herself, irrevocably and forever, of all rights of reclamation against said property, whether under mortgage privilege or other-

203 wise. Whereupon the said wife declared that she still persisted in the intention she had announced, to ratify said act of sale and to dispossess herself of all rights and liens which she has upon said property, whether by marriage contract, dower donation, or otherwise; and the said husband, being now again present before me, and authorizing his said wife, she again declared that she does hereby formally renounce, henceforth and forever, all and singular her said rights, and transfer the same to the said purchasers, their heirs and assigns, to be had and held by them, and by them enjoyed, in law and thereout; and she hereby binds herself and her heirs to the said purchasers, their heirs and assigns, that she shall, and will, at all times acknowledge the validity of the present sale and of the renunciation she now makes of all rights which she has or

204 may have in and to the said property and appurtenances, and that neither she nor they shall ever seek to oppose or impair the force of this act, hereby renouncing the benefit of all laws, privileges, and customs of which she might avail herself, *are* which are in her favor in the premises.

Done and passed, at New Orleans, the first day of March, eighteen hundred and sixty-nine, in presence of Marcel T. Ducros and Joseph

W. Jones, witnesses, residing in this city, who have signed their names, with the said appearers and me, notary, after reading thereof.

(Original signed) CHAS. MORGAN.
MARY J. MORGAN.
W. B. SCHMIDT.
F. M. ZIEGLER.

M. T. DUCROS.
J. W. JONES.

EDW'D BARNETT, *Not. Pub.*

A true copy.
New Orleans, May 5th, 1869.

(Signed) EDW'D BARNETT,
Not. Pub.

205 *Promissory Notes Attached to Deed of Sale.*

$10,000. NEW ORLEANS, 1*st March*, 1869.

Twelve months after date we promise to pay to the order of ourselves, at the Bank of America, in this city, the sum of ten thousand dollars in current funds, with interest thereon at the rate of eight per cent. per annum from date until paid, value received.

SCHMIDT & ZEIGLER.

[Signatures cancelled.]

Endorsed on back: (Signed) Schmidt & Ziegler.

[Written across the face in red ink:] "Ne varietur." Secured by mortgage, which is duly stamped New Orleans, 1st March, 1869. Paid. Cancelled.

$10,000. NEW ORLEANS, 1*st March*, 1869.

Six months after date we promise to pay to the order of ourselves, at the Bank of America, in this city, the sum of ten thousand dollars in current funds, with interest thereon at the rate of eight per cent. per annum from date until paid, value received.

SCHMIDT & ZEIGLER.

[Signatures cancelled.]

Endorsed on back: (Signed) Schmidt & Ziegler.

[Written across the face in red ink:] "Ne varietur." Secured by mortgage, which is duly stamped New Orleans, 1st March, 1869. (Signed) Edw'd Barnett, not. pub. Paid. Cancelled.

206 $10,000. NEW ORLEANS, 1*st March*, 1869.

Eighteen months after date we promise to pay to the order of ourselves, at the Bank of America, in this city, the sum of ten thousand dollars, in current funds, with interest thereon at the rate of eight per cent. per annum from date until paid, value received.

(Signed) SCHMIDT & ZIEGLER.

[Signatures cancelled.]

Endorsed on back: (Signed) Schmidt & Ziegler.

[Written across the face in red ink:] "Ne Varietur." Secured by mortgage, which is duly stamped New Orleans, 1st March, 1869. (S'g'd) Edw'd Barnett, not. pub. Paid. Cancelled.

$10.000. NEW ORLEANS, 1*st March*, 1869.

Twenty-four months after date we promise to pay to the order of ourselves, at the Bank of America, in this city, the sum of ten thousand dollars, in current funds, with interest thereon at the rate of eight per cent. per annum from date until paid, value received.

(S'g'd) SCHMIDT & ZIEGLER.

[Signatures cancelled.]

Endorsed on back: (S'g'd) Schmidt & Ziegler.

[Written across the face in red ink:] "Ne Varietur." Secured by mortgage, which is duly stamped New Orleans, 1st March, 1869, (S'g'd) Edw'd Barnett, not. pub. Paid. Cancelled.

207 *Certificate.*

I, James T. Clark, clerk of the civil district court for the parish of Orleans, do hereby certify the foregoing one hundred and ninety-nine pages do contain a true and correct transcript of all the proceedings had, documents filed, testimony and evidence adduced on the trial of the cause entitled Widow B. Avegno, tutrix, *et als. vs.* Schmidt & Ziegler, instituted in the late fifth district court for the parish of Orleans, under the No. 10375 of the docket thereof and transferred to this court under the No. 1996 of the docket hereof.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of this court on the first day of, April in the year of our Lord one thousand eight hundred and eighty-two, and in the one hundred*th* and sixth year of the Independance of the United States.

[SEAL.] JAS. T. CLARK, *Clerk.*

208 Supreme Court of Louisiana.

Filed 3d April, 1882.

(Signed) T. McC. HYMAN,
D'y Clerk.

Widow B. AVEGNO & *als.*
vs.
SCHMIDT & ZIEGLER. } No. 8492.

Appeal from the Civil District Court for the Parish of Orleans.
No. 1996.

Albert Voorhies, for plaintiffs & appellants; Miller, Finney & Miller, for defendants & appellants; Leovy & Keirttschuibb for warrantors & appellees.

Transcript of Appeal.

209 *Motion & Order for Time. Extract from the Minutes.*

MONDAY, *February 6th*, 1882.

The court was duly opened pursuant to adjournment.
Present: Their Honors E. Bermudez, chief justice; Rob't B. Todd, Chas. E. Fenner, associate justices.
Absent: Felix P. Poche, Wm. M. Levy, associate justices.

Widow B. AVEGNO & *als.*
vs.
SCHMIDT & ZEIGLER. } No. 8492.

On motion of Albert Voorhies, Esq., of counsel for plaintiffs, and considering the affidavit on file of the clerk of the lower court, it is ordered by the court that plaintiffs be allowed thirty days to bring up the appeal in this case.

Motion & Order for Time. Extract from the Minutes.

MONDAY, *March 6th*, 1882.

The court was duly opened pursuant to adjournment.
210 Present: Their Honors Edward Bermudez, chief justice; Felix P. Poché, Robert B. Todd, Wm. M. Levy, Charles E. Fenner, associate justices.

Widow B. AVEGNO & *als.*
vs.
SCHMIDT & ZEIGLER. } No. 8492.

On motion of Albert Voorhies, Esq., of counsel for plaintiffs, and considering the affidavit on file of the clerk of the lower court, it is ordered by the court that plaintiffs be allowed thirty days additional to complete the transcript of appeal in this case, and to file the same in this court.

Continuance. Extract from the Minutes.

FRIDAY, *March 16th*, 1883.

The court was duly opened.
Present: Edward Bermudez, chief justice; Robert B. Todd, Chas. E. Fenner, Thomas C. Manning, associate justices.
211 Absent: Felix P. Poche, associate justice.

Widow B. AVEGNO & *als.*
vs.
SCHMIDT & ZEIGLER. } No. 8492.

This case was ordered by the court to be continued with preference.

Appearance & Submission Extract from the Minutes.

FRIDAY, *April the 27th*, 1883.

The court was duly opened.

Present: Their Honors Edward Bermudez, chief justice; Felix P. Poché, Robert B. Todd, Charles E. Fenner, Thomas C. Manning, associate justices.

Widow B. AVEGNO & *als.*
vs.
SCHMIDT & ZEIGLER. } No. 8492.

This case was called for trial, and having heard argument from Albert Voorhies, Esq., of counsel for plaintiffs & appellants; from Henry C. Miller, Esq., of counsel for the defendants & appellees, and from Henry I. Leovy, Esq., of counsel for Charles Morgan, warrantor & appellee.

212 The court took said case under advisement upon the briefs now on file for parties in interest.

(Mr. Chief Justice Bermudez recused.)

Agreement. Filed April 27, 1883.

Supreme Court La.

Widow B. AVEGNO
v.
SCHMIDT & ZIEGLER. } No. 8492.

It is agreed the within be deemed part of the record, being omitted in record. Same marked XX and YY.

(Signed) ALBERT VOORHIES, *Att'y.*

Agreement. Filed March 16, 1883.

Supreme Court.

Widow B AVEGNO & *als.*
vs.
SCHMIDT & ZIEGLER. } No. 8492.

It is agreed that the six mortgage notes offered in evidence by warrantor, to wit, the six notes furnished by B. Avegno for mortgage on the "four lots" in suit, and which are not copied in
213 the transcript of appeal, be supplied by their recital in said mortgage act, and in the foreclosure proceedings before the U. S. circuit court, which act and proceedings are copied in said transcript, and it is dispensed to have said promissory notes copied in said transcript, as their purport and content are already fully set forth in said act and foreclosure suit.

(Signed) ALBERT VOORHIES,
Att'y for Pl'ffs.

And further agreed that either party may bring up in original or copy such parts of records of Morgan *vs.* Avegno, No. 5279, U. S. C. C., or other records as he may desire.

(Signed) MILLER & FINNEY,
For Def'd'ts.
ALBERT VOORHIES,
For Pl'ffs.
LEOVY & KRUTTSCHMIDT,
Att'y for Morgan's Estate.

214 *Final Decree & Opinion. Filed May 21st, 1883.*

Supreme Court of Louisiana.

Mrs. Widow Bernard Avegno & *als.*
vs.
Schmidt & Zeigler.
} No. 8492.

Mr. Justice Poché:

A statement of the salient facts which have given rise to this controversy is necessary to a proper understanding of the issues involved therein.

On the 20th January, 1865, proceeding- were instituted under the act of Congress of July 17, 1862, known as the "confiscation act," for the condemnation of seven lots of ground in this city as the property of Bernard Avegno.

On the 13th of April of the same year Charles Morgan, a citizen of New York, holding notes of Avegno amounting together to $36,400, secured by mortgage on four of the lots in question, filed an intervention in the proceedings for confiscation, for
215 purpose of preventing the condemnation, or, in the alternative, for the recognition and enforcement of his mortgage rights.

On July 14th judgment was rendered condemning the seven lots, ordering the sale thereof, decreeing that Morgan's mortgage could "not be acknowledged," and dismissing his intervention.

On August 1 Morgan's motion for a new trial was overruled, wherefrom he took a suspensive appeal to the circuit court, where it was dismissed in March, 1872. From the latter judgment he took an appeal to the Supreme Court of the United States, where the judgment was affirmed.

In the meanwhile the three lots not affected by Morgan's mortgage were sold by the marshal, but the record shows no further proceedings against the four lots subject to Morgan's mortgage.

The appeal taken by him was apparently construed by all parties concerned to have had the effect of suspending the judgment of condemnation in so far as it affected the four lots in question.
216 In June, 1867, Morgan instituted suit on his notes and mortgage against Bernard Avegno, who accepted service of the petition. In execution of the judgment rendered in that suit in the U. S. circuit court the four lots in question which were found in

the possession of Avegno were seized by the marshall and were adjudicated to Charles Morgan in December, 1868, for $5,000.00. In March, 1869, Morgan sold the lots to Schmidt & Zeigler.

This suit is brought by the children and heirs of Bernard Avegno, who died in 1872. They claim the property under the reversion in favor of Avegno's heirs, under the effect of the condemnation of his property under the confiscation act, and they prosecute this appeal from an adverse judgment.

The defendants and the succession of Morgan called in warranty maintain the legality of Morgan's proceedings in the execution of his mortgage, even if the confiscation proceedings had been regular and final, and had legally divested Avegno of his titles to the property, and they charge nullity in the confiscation proceedings,
217 finally alleging that all proceedings for confiscation then pending were abrogated by the proclamation of pardon issued by the President of the United States in December, 1868.

The view which we have taken of this case entirely eliminates from discussion the numerous vexed and complicated question- of the legality of the confiscation proceedings, as well as of the nature and effect of the appeal taken by Morgan from the judgment of condemnation in which his intervention was dismissed.

A correct interpretation of the act of Congress of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," as explained by a resolution adopted by that body on the same day, explanatory of said confiscation act, irresistibly leads to the conclusion that "all that can be sold by virtue of a decree of condemnation and order of sale under the act was a right to the property seized, terminating with the life of the person for whose offense it had been seized."
218 Bigelow *vs.* Forrest, 9 Wal., 339.

Hence, it was held in that case that although the claimant, under his father, was himself liable to confiscation under the act as an officer of the Confederate army, such circumstances were no bar to his recovery.

As a corrol-ary from the main proposition, it follows logically that the rights of other parties in the condemned property could not, in the least, be affected by the confiscation proceedings against the offender, and that a sale made under such proceedings could not impair rights of mortgage in favor of third persons on the condemned property. In the case of Day *vs.* Micon, 18 Wal., 160, this question was directly involved in the controversy, and the Supreme Court on the United States unequivocally adopted this interpretation, and speaking of mortgage rights, *bona fide* acquired by third persons of the offender's property previously to his offense, the court said: "Their interests did not pass to the purchaser at the sale, and they remain unaffected by the decree of condemnation and
219 the sale thereunder." In the case of Waples *vs.* Hays, Morrisson's Transcript, Vol. 5, No. 2, speaking of the rights of the mortgagee, the court said: "As his lien was not condemned, his

rights under it would have been superior to the title acquired by the Waples."

After a careful examination and a patient study of the jurisprudence, as established by the decisions of the Supreme Court of the United States, we reach the conclusion that a sale of immovable property under confiscation proceedings, in accordance with the act of Congress, has no more the effect of impairing the rights of mortgage of third persons, than an expropriation by private act or judicial process would under our laws.

Hence, it follows that admitting the perfect legality and binding force and effect of the confiscation proceedings against Bernard Aregno, and that he had thereby been completely divested of title to the fee as fully as could have been accomplished by a sheriff's sale under our practice, the mortgage rights of Morgan were not in the least affected by this devestiture of title, and continued
220 to attach to the property, either in the hands of the United States or of the purchaser under the proceedings, or in the indefinite ownership of the fee, vested under the act, in the presumptive heirs of Avegno.

While plaintiff's counsel strenuously contends that the judgment of the district court in the confiscation proceedings, disposing of Morgan's intervention was a judgment on the merits, and final, we do not understand him to argue therefrom that in such a case Morgan's mortgage was extinguished or destroyed by that judgment. The argument would be too bold indeed, the proceeding being *in rem*, from the very nature of which Avegno was not a party thereto.

It is a patent that under such a state of pleadings no judgment could have been rendered so as to be binding on the mortgager, and hence, for want of proper parties, the mortgagee himself could not have been bound by such a judgment.

Granting that the judgment rendered under the pleadings was intended by the judge to be on the merits and final, it must be
221 construed as determining nothing more than the issue involved under the pleadings, as they were then composed.

The issue presented by Morgan's intervention was twofold: 1st. The right of condemnation. 2d. His mortgage rights under the proposed sale. On the first issue the decree was that the property should be condemned, and subsequently sold. On the second issue the decree was that Morgan's mortgage could not be acknowledged, meaning, evidently, not acknowledged as prayed for under the proceedings, but nothing more.

We cannot do the injury to the judge of that court to suppose that he intended, by his judgment, to pass upon and dispose of issues which were manifestly beyond his jurisdiction.

Should, however, the necessities of this case require it, we would have no hesitation in declaring that, in our opinion, the judgment rendered was merely one of dismissal, and was not intended to affect the merits of Morgan's claim. It decreed that his mortgage could not be acknowledged in the proceedings then pending, and
222 dismissed his intervention. Morgan's rights having been unaffected by the confiscation proceedings, and his act of mort-

gage containing the clause or part "*de non alienando*," he was authorized to proceed in foreclosing his mortgage against Avegno, his mortgagor, in the same manner as though no devestiture of the latter's title and ownership had ever occurred.

This rule is elementary in our practice, and, at this stage of our jurisprudence, need not be supported by authority.

If it was, then, under plaintiff's theory, the life estate which had not been sold was in the Government, but subject to "*bona fide*" mortgages, and, under the pact "*de non alienando*," subject to seizure with the fee as vested in the presumptive heirs to seizure by proceedings against the mortgagor.

If he was not div-sted, then his possession of the property from 1866, as shown by the record, was the possession of the owner, and he was legally dispossessed and expropriated by the marshall's seizure and by his sale in execution of Morgan's judgment.

We conclude that our learned brother of the district bench
223 has done justice to the parties.

Judgment affirmed.

Mr. Chief Justice Bermudez recuses himself, having been of counsel.

Final Decree. Extract from the Minutes.

MONDAY, *May 21st*, 1883.

The court was duly opened pursuant to adjournment. Present: Their honors, Edward Bermudez, chief justice; Felix P. Poche, Robert B. Todd, Chas. E. Fenner, Thomas C. Manning, associate justices.

Widow B. AVEGNO *& als.*
vs.
SCHMIDT & ZEIGLER. } No. 8492

On appeal from the civil district court for the parish of Orleans.

Judgment affirmed.

224 *Petition for Rehearing. Filed May 28th*, 1873.

Supreme Court of Louisiana.

Heirs of B. AVEGNO
vs.
SCHMIDT & ZEIGLER. } No. 8492.

Plaintiffs respectfully apply for a rehearing upon the following grounds, which will be elaborated in the accompanying brief, in printed form:

1st. The court erroneously holds, in the first place, that, in the matter of the U. S. *vs.* Seven Lots, the property of B. Avegno, the intervenor, Charles Morgan appealed also from the judgment of condemnation, and not exclusively from the judgment dismissing Morgan's claim as a mortgage creditor; and, in the second place, that the judgment dismissing Morgan's claim was not one of rejection, but in the nature of a nonsuit.

225 The record shows affirmitively (page 93) that Morgan introduced full evidence of his claim in writing; the parol evidence, *pro* and *con*, was not taken down in writing in such cases, as the case was not one in equity or admiralty, but at law. See authorities in brief to be filed.

Record, page 113. The judgment of condemnation, after recognizing four mortgage claims, preferred by other intervenors, and ordering them to be paid out of the proceeds of the condemned property, decrees "that the interventions of Charles Morgan and P. Lorenzon, which cannot be acknowledged, be dismissed with costs, reserving the right to the proctors of the rejected claims to make further argument." (See authorities in brief as to meaning of term dismissed in judgment of Federal and State courts.)

Record, page 118. "This cause came up on the claims of the mortgages 'rejected;' Lorenzon was allowed to file additional evidence; and, as to Morgan, the court took further time to consider."

226 Rec., page 118. Subsequently "the judgment dismissing Morgan's intervention was maintained."

Page 133. In Morgan's petition for an appeal he qualifies his demand by setting forth that he is a mortgage creditor, intervening for the purpose of enforcing his rights of mortgage against certain lots of ground.

Rec., page 140. The opinion of the Federal Supreme Court sets forth explicitly what appeal was taken. "Morgan claimed a mortgage right on the proceeds of sale under the judgment of the district court by virtue of acts passed April 3rd and 4th, 1862, he being a citizen of New York." His intervention was dismissed July 14th, 1865, and he appealed to the circuit court. His appeal was dismissed on the ground that the libel was in all respects a suit at law, and not in equity or admiralty. Judgment affirmed.

227 Rec., page 142. After this decision by the Federal Supreme Court, Morgan and the U.S. district attorney, filed in the circuit court an agreement, as follows:

"The intervention filed by Charles Morgan, claiming under a mortgage executed by Avegno and wife on 3d April, 1862, is withdrawn, and so much of the judgment as passes upon the effect and validity of said mortgage is hereby set aside and released."

Thus leaving in full force the judgment of condemnation, from which no appeal has been taken and attempting to vacate a final judgment on the merit of Morgan's mortgage claim. In the meantime, and pending appeal, the district court had executed the judgment of condemnation through writ of *venditioni exponas*. (R., p. 130.)

The above quotations from the record show conclusively that the district court passed on the merits of all the claims of intervenors, rejected the claim of Morgan, and allowed the others to be paid out of the proceeds of the sale of condemnable property.

228 They show conclusively that the district court construed the appeal as *as* not taken from the decree of condemnation, but as taken from the decree rejecting Morgan's mortgage

claim, since it issued pending the appeal, the writ of execution, or *venditioni exponas.*

They show conclusively that Morgan himself construed the judgment on his intervention as "rejecting" his mortgage claim, and as passing upon the effect and validity of said mortgage, since these are the precise terms applied by himself in his pleadings to the judgment of dismissal of his rejected claim.

This court, however, construes this judgment otherwise than the Federal court and Morgan himself; and it disregards the fact (undisputed) that Morgan's mortgage claim was tried, like other intervenors, on its merits.

II. The court apparently granting that the decree was final on the intervention of Morgan, as to the merits, then proceeds to construe it as final, not on the merits, but in simply not acknowledging the mortgage claim.

229 Practically, the result of their proposition is, while the decree appears to reject the claim on the merits, yet in reality it is a mere judgment of non-suit.

It is preferable to adhere to recognized and usual expressions in this respect in order to avoid the logical errors resulting from ambiguity in the terms used in the premises.

A judgment final on the merits is one that either dismisses and rejects the demand itself, or enforces it, and as a matter of course it acknowledges, or does not acknowledge, the demand.

A judgment, when a case is tried on the merits, but the court does not pass on the merits, dismisses the demand, as in case of non-suit. When the judgment dismisses a case which is tried on the merits, and does not qualify the dismissal, it is one of rejection.

Now, in the Avegno confiscation proceedings the intervention was tried on the merits, and the court terms the judgment of dis-

230 missal of Morgan's intervention as rejecting the mortgage claim itself. The judge of that court intended to, and did, reject Morgan's mortgage claim, and in so doing he did precisely what he was called upon to do under the very issue presented before him.

This honorable court will not do him the injury to infer that he actually did "pass upon and dispose of issues which were not submitted to him, and which were manifestly beyond his jurisdiction."

Was it beyond his jurisdiction to acknowledge four mortgage claims and order them to be paid out of the proceeds of the condemned property? Yet this he did, and the mortgagees were paid accordingly. If he had no jurisdiction *quoad* Morgan's intervention, did he have any more as to the other successful intervenors?

Whatever may have lurked in the judicial breast, the proof is patent in the transcript that the Federal district court tried

231 all the interventions on their respective merits, dismissed Morgan's as rejected and not as in case of non-suit, and sanctioned the other claimants' demand.

III. This court holds that Avegno not being a party to the proceeding *in rem,* no judgment could be rendered to bind the mortgagee or mortgagor.

Avegno was a party to that proceeding *in rem* by the actual seizure of his property and the regular monition process and default. Indeed, the whole world was a party to this proceeding *in rem.* (See authorities to be furnished in brief.)

And Morgan not only was a party constructively by the monition, but he voluntarily made himself a militant party by availing himself of the provisions of the act of Congress of 1862, ch. 189, p. 591. (See 7, 8, and 14 of act of Congress of 1863, ch x c, p. 762, reenacted as R. S. See 5322.)

Morgan and Avegno and the whole world were parties to
232 the proceedings *in rem* for the confiscation of the seven lots in question.

IV. The court makes a fatal mistake in holding as follows: "We do not understand him (*i. e.*, plaintiff's counsel) to argue therefrom that Morgan's mortgage was extinguished or destroyed by that judgment." (*i. e.*, on Morgan's intervention.)

We must unquestionably so argue, and our pleadings setting forth the defence of *res -judicata*, and our brief insisting upon the defence, would then amount to nothing if we did not so argue. Of what avail then would be *res -judicata?*

We will show in our brief that Morgan was and made himself a party to the proceedings *in rem;* that availing himself of the right to intervene, he did, in the proper manner, ask the foreclosure in that proceeding of his mortgage rights against the *rem* that was in court to be sold, *i. e.*, the life estate; that there were all the proper parties; that the decree finally rejected Morgan's claim *in*
233 *toto*, and, as a legal consequence, that his claim, debt, and mortgage was as effectually extinguished and destroyed as any judgment of a competent court can effect such result. And we will support the above views by numerous and weighty authorities to the point (to be furnished).

V. The plea of *res judicata* is made out, because Morgan's claim was rejected on the merits in a proceeding before a court of competent jurisdiction. The thing seized represented through the monition the whole world, as the authorities conclusively show. The demand was founded on the same cause of action, and there was identity of the thing demanded. C C 2286 (2265).

VI. Such having been the fate of Morgan's mortgage claim, he could no more enforce it by subsequent proceeding. True, B. Avegno subsequently allowed judgment to go against him personally by default, and did not set up the plea of *res judicata* as well he
234 might have done. But his failure to do so does preclude or estop plaintiffs, who were no parties to this last proceeding, and who then were vested with the ownership by the final decree of confiscation.

At that time Avegno had lost all legal control over the property; could not represent it in court; could not dispose of it by will; could not by act *inter vivos* sell or donate the property, even subject to the life estate then vested in the Government.

VII. But does the *pact de non alienando* cure the defect?

The property then was in *germio legis* subject to the control of the

Federal district court, which had condemned it, and could at the proper time proceed to sell the life estate under the decree of condemnation.

Could the circuit court wrest the property from the district court, and by execution render a judgment against Avegno personally, order and make the sale of the condemned property to suit itself?

235 This point your honors do not directly pass upon, and yet it is one of grave import.

Practically, however, the opinion sanctions affirmatively that proportion at least in the case at bar.

But we propose to show by authority that the *pact de non alienando* (full effect to which we conceded in our original brief by reference to abundant authorities) does not extend and has never been applied to cases where expropriation takes or has taken place, nor to cases where there is a seizure and sale made by a competent judicial authority, and still less when another court has possession of the *rem* for adjudication in a legitimate proceeding.

The opinion considers that we deny the doctrine of the *pact de non alienando*, while, on the contrary, we advocate it, but with the safeguards of the law.

For the above reasons, which we propose to support by au-
236 authorities, both elementary and others, in the printed brief now in preparation, plaintiffs respectfully pray for a rehearing.

(Signed) ALBERT VOORHIES, *Att'y.*

Rehearing Refused. Extracts from the Minutes.

THURSDAY, *May* 31*st*, 1883.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Robert B. Todd, Charles E. Fenner, Thomas C. Manning, associate justices.

Widow B. AVEGNO & *als.*
vs.
SCHMIDT & ZIEGLER. } No. 8492.

It is ordered that the rehearing applied for in this case be refused.

237 *Bond for Writ of Error. Filed* 29*th August*, '84.

Mrs. Widow BERNARD AVEGNO, Tutrix & *als.*, Plaintiffs in Error,
vs.
WILLIAM B. SCHMIDT & *als.*, Defendants in Error. } No. 8942.

Know all men by these presents, that we, Mrs. Widow Bernard Avegno, tutrix of her minor children, Albert Avegno and Pierre Avegno, Bernard Avegno, Jr., Lucie Avegno, wife of William Voorhies, and Marie Avegno, wife of Leandre Leroy, as principals, and Albert Voorhies and Phi Avegno, as sureties, are held unto Wm. B. Schmidt, Francis M. Zeigler, and the succession of Charles

Morgan, in the full and just sum of five hundred dollars, to be paid to the said Wm. B. Schmidt, Francis M. Zeigler, and the succession of Charles Morgan, certain attornies, executors, administrators, or assigns, to which payment, well and truly to be made,
238 we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 4th day of August, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a supreme court of the State of Louisiana, holding sessions at New Orleans, La., in a suit pending in said supreme court, wherein said Mrs. Widow Bernard Avegno, tutrix, & others, above-named principals, are plaintiffs, and William B. Schmidt, Francis M. Zeigler, and the succession of Charles Morgan are defendants, judgment was rendered against said Mrs. Widow Bernard Avegno, tutrix, and the other above-named plaintiffs, having obstained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to Wm. B. Schmidt, Francis M.
239 Zeigler, and the succession of Charles Morgan, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said Mrs. Bernard Avegno & *als.* shall prosecute their writ to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) ALBERT VOORHIES.
" PHI AVEGNO.

Sealed and delivered in the presence of—
(Signed) ALBERT VOORHIES, *Witness.*

Approved Aug. 16th, 1884.
(Signed) W. B. WOODS,
Associate Justice United States Supreme Court.

240 *Certificate of Clerk of the Supreme Court.*

Supreme Court of the State of Louisiana.

UNITED STATES OF AMERICA, *State of Louisiana:*

I, George W. Dupre, clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, do hereby certify that the foregoing two hundred & thirty-nine pages contain a full, true, and complete copy of the transcript of the proceedings had in the civil district court for the parish of Orleans in a certain suit wherein Widow B. Avegno & *al.* were plaintiffs and Schmidt & Zeigler were defendants, and also of all the proceedings had in this supreme court on the appeal taken by said plaintiffs, which appeal is now on the files thereof under No. 8492.

In testimony whereof I have hereunto set my hand and affixed

the seal of the supreme court of the State of Louisiana, at the city of New Orleans, this sixteenth day of June, anno Domini
241 one thousand eight hundred and eighty-four, and in the one hundred and eighth year of the Independence of the United States of America.

[SEAL.] GEORGE W. DUPRE, *Clerk.*

Certificate of the Chief Justice.

Supreme Court of the State of Louisiana.

UNITED STATES OF AMERICA, *State of Louisiana:*

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, do hereby certify that George W. Dupre is clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans; that the signature of George W. Dupre to the within certificate is in the proper handwriting of him, the clerk; that said certificate is in due form of law, and that full faith
242 and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this sixteenth day of June, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] E. BERMUDEZ,
Chief Justice of the Supreme Court of Louisiana.

243 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mrs. Widow Bernard Avegno, tutrix of her minor children, Albert Avegno and Pierre Avegno, Bernard Avegno, Jr., Lucie Avegno, wife of William Voorhies, and Marie Avegno, wife of Leandre Leroy, plaintiffs, and William B. Schmidt and Francis M. Zeigler, defendants, and the succession of Charles Morgan, called in warranty, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the
244 Constitution; or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Mrs. Widow Bernard Avegno, tutrix of her minor children, Albert

Avegno and Pierre Avegno, Bernard Avegno, Jr., Lucie Avegno, wife of William Voorhies, and Marie Avegno, wife of Leandre Leroy, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifth day of July, in the year of our Lord one thousand eight hundred and eighty-four.

E. R. HUNT,
Clerk of the Circuit Court of the United States
for the Eastern District of Louisiana.

Allowed by—
W. B. WOODS,
Associate Justice U. S. Supreme Court.

245 The United States of America to William B. Schmidt, Francis M. Ziegler, and the succession of Charles Morgan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, at New Orleans, La., wherein Mrs. Widow Bernard Avegno, tutrix of her minor children, Albert Avegno and Pierre Avegno, Bernard Avegno, Jr., Lucie Avegno, wife of William Voorhies, and Marie Avegno, wife of Leandre Leroy, are plaintiffs in error and you are defendant- in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Woods, Associate Justice of the Supreme Court of the United States, this sixteenth day of August, in the year of our Lord one thousand eight hundred and eighty-four.

WILLIAM B. WOODS.

246 On this first day of September, in the year of our Lord one thousand eight hundred and eighty-four, personally appeared before me, the subscriber, John H. Simonds, deputy United States marshal, eastern district of Louisiana, and makes oath that he delivered a true copy of the within citation to Wm. B. Schmidt, Francis M. Zeigler, and succession of Charles Morgan, on Henry J. Leovy, attorney for said succession.

Sworn to and subscribed, the 1st day of September, A. D. 1884, before me, at New Orleans, La.

J. DEVONSHIRE, [SEAL.]
U. S. Commissioner.

[Endorsed:] Citation & return.

Endorsed on cover: Louisiana supreme court. No. 946. Mrs. Widow Bernard Avegno, tutrix of her minor children, Albert Avegno and Pierre Avegno. Bernard Avegno, Jr., Lucie Avegno, wife of William Voorhies, and Marie Avegno, wife of Leandre Leroy, plaintiffs in error, *vs.* William B. Schmidt and Francis M. Ziegler and the Succession of Charles Morgan. Filed September 20, 1884.

Brief Plaintiffs in error.

113-293

FILED
NOV 3 1884
JAMES H. McKINNEY,
CLERK.

Supreme Court of the United States.

No.

HEIRS OF B. AVEGNO

vs.

SCHMIDT & ZIEGLER & ALS.

From the Supreme Court of Louisiana.

PLAINTIFFS' BRIEF ON MOTION TO DISMISS AND ON THE MERITS.

I. The assignment of errors at page 5 of this brief disposes effectually of the motion to dismiss on the ground of want of jurisdiction.

The writ of error was not asked for delay, since plaintiffs are not in, but sue for the possession of property, to which they assert title. Quite the reverse, they are willing to submit this case on the present brief on the merits; and now propose to do so under the rules of the Court.

FACTS.

1865, January 20. — Proceedings in United States District Court for condemnation of *seven lots*, properties of B. Avegno.

The libel recites the *preliminary seizure actually*

made, under directions of President of United States, by B. F. Flanders, Supervising Agent Treasury Department.

The fact of this seizure is not contradicted by any evidence whatever in this case. Defendants do not even attempt to prove the contrary. The Court will, besides, bear in mind the legal presumption of actual preliminary seizure, which, in such cases fully obtains. — Pelham vs. Rose, 9 Wallace, 106; 11 Wallace, Miller's case, 294; ibid. Tyler vs. Defrees, 344; Slidell's case, 20 Wallace, 93; Gelston vs. Hoyt, 3 Wh. 246; Comstock vs. Crawford, 3 Wall. 396.

1865, January 21. — Seizure of the *seven lots* by the United States Marshal, who takes them *in his possession.* (See his *uncontradicted return.*)

1865, April 13.—Morgan's intervention, claiming special mortgage on *Four of the Seven lots*, — and preference to be paid out proceeds of sale.

1865, July 14. — Condemnation of *the Seven lots* by final judgment, — and a decree of venditioni exponas, — *the mortgage claim of Morgan rejected on merits.* The mortgage claims of other intervenors, on the other three lots, were recognized as valid; and decree entered that they be paid out of the proceeds of the sale.

1865, August 1. — Morgan's motion for a new trial *as to rejection of his mortgage claim* against proceeds, overruled.

1865, August 4. — *Suspensive appeal*, taken by Morgan to decree *rejecting his mortgage claim.*

1867, June 25. — Foreclose suit brought, *pending suspensive appeal*, by Morgan against B. Avegno on

the same mortgage notes; judgment against Avegno *in personam* and mortgaged property ordered to be sold. *The confiscatee B. Avegno accepts service of petition and waives citation.*

1868, December 21. — Marshal's sale of the *Four Lots* under said foreclosure judgment. *Property adjudicated to Morgan and delivered to him.* (R. p.)

1868, December 26. — *Proclamation of Amnesty.* — (Morgan argues that Avegno was entitled to the full benefit of pardon ; but as Morgan does not propose to return the property to confiscatee, this proposition must have a Pickwickian meaning) — Beside : held that pardon did not affect either the Government's or heirs' vested rights. (20 Wallace, 93 ; 13 Wallace, 157 ; 5 Otto, 149.)

1872, March 30. — Circuit Court dismisses Morgan's appeal ; but he appeals to Supreme Court at Washington from this judgment.

1872, August 12. — Death of Bernard Avegno.

1874, May 4. — Supreme Court dismisses Morgan's appeal, leaving the original judgment of the District Court of the United States final as against Morgan's claim. Then it was that an *unwarranted agreement* was entered between District Attorney and Morgan's counsel to *cancel final judgment rendered against Morgan on his intervention.* (R. p. .)

1874, June 1. — Entry of above agreement of cancellation on minutes of Circuit Court, but no decree allowed by the Court to give it sanction. (R. p.)

With regard to the six mortgage notes of B. Avegno, upon which Morgan foreclosed against

the same property in the United States Circuit Court, after they had been *rejected as illegal and invalid* by the United States District Court, on Morgan's own intervention, (R. pp.), it appears they were executed by B. Avegno, while the federal fleet was operating against the forts below the city of New Orleans, (April, 1862). The mortgage was consented in favor of J. C. Harris, not a real obligee, however, for subsequently J. C. Harris, *as agent of Charles Morgan*, subscribed the *jurat* to Morgan's petition of intervention in the confiscation suit. (R. p.)

The evidence given on Morgan's intervention in the confiscation suit as to the validity of these mortgage notes, does not now appear in full. But issue was joined in that respect; and a reargument of the case was had, — both times resulting in the rejection of the mortgage clain of Morgan, (R. pp.). Other intervenors had succeeded in having their mortgage claims respectively allowed.

It was not a non-suit, — but a clear rejection of Morgan's demand as a mortgage creditor; in his petition for an appeal he terms it "*a final judgment*," "*rejecting his said claim to a mortgage on said four lots.*" (See infra.)

Furthermore: the appeal had been taken only as regards the rejection of his mortgage claim. (Petition p. .) The appeal was limited *to the four lots*, (Order p.) which were appraised for that purpose under decree of Court (R. p. ; see also United States Supreme Court mandate and opinion. (R. p. .)

In the meantime the other three lots were sold in

due course, and the successful intervenors received their dues.

ASSIGNMENT OF ERRORS.

The judgment of the Louisiana Supreme and District Courts is erroneous in the following respects:

1° It does not give effect to, but nullifies the decree of confiscation in matters of U. S. vs. seven lots, the property of B. Avegno, No. 7972 of the U. S. District Court.

The immediate effect of said decree of confiscation was to divest all interest of the confiscatee, B. Avegno; and, from that very moment said confiscatee was expropriated, and the property being vested in the Government and in the presumptive heirs of confiscatee. 92 U. S. 202; 95 U. S. 711, 713, 102; U. S. 132.1 Otto 25, Semmes vs. U. S.

2° Said judgment sanctions the unwarranted proceedings of C. Morgan, in subsequently foreclosing his pretended mortgage claim against the property condemned in utter disregard of the decree of condemnation.

A decree of condemnation does not impair the rights of a mortgage creditor on property condemned; but such creditor cannot disregard or ignore the divestiture of his debtor's ownership by condemnation, and the rights of ownership acquired by the Government and by the heirs. From the date of condemnation the confiscatee loses all right to, or control over the property condemned;—and he cannot, by his consent, give jurisdiction to the Court for

the foreclosure of mortgages and the sale of the property condemned.

The mortgage creditor may, after condemnation, move against the property condemned; *but he cannot do so contradictorily with the confiscatee alone.* The latter having been effectually *expropriated* by the decree of condemnation, he has no capacity to stand in Court with reference to the condemned property.

The pact *de non alienando* is a mere contractual stipulation, by which the mortgagor *binds himself personally* not to alienate the property mortgaged. It does not stipulate,—indeed, how could it?—against forced expropriations prosecuted under laws of public order or policy, and against forced sales through judicial proceedings.

The pact *de non alienando,* stipulated in the act of mortgage held by Ch. Morgan, is to the effect that B. Avegno shall not alienate the property himself, of his own volition; but not that the Government shall not expropriate him, either through confiscation proceedings or otherwise. The condemnation of the "Seven lots, the property of B. Avegno", was as binding on C. Morgan, as mortgage creditor,—as it was binding on the world.—Therefore, when C. Morgan subsequently foreclosed, he should have followed the property in the hands of the Government and heirs;—*and not by proceeding against the confiscatee alone.*

3° Said judgments of the Louisiana District and Supreme Courts do not give effect to the judgment of the Federal District Court, rejecting the demand of Ch. Morgan on his intervention in the condemnation

proceedings in the matter of U. S. vs. seven lots, the property of B. Avegno. Said Federal Court had jurisdiction in the premises; and said Ch. Morgan had voluntarily subjected himself to its jurisdiction. Judgment was rendered on the merits, rejecting Morgan's claim; but said State Courts limited said Federal judgment to one merely of nonsuit. Act of Congress 1862, p. 591, sec. 7, 8, 14; - Waples vs. Hayes, U. S. R. p.— The Court *a quâ* erroneously overruled the plea of *res judicata.*

4° The judgment of the Court *a quâ* erroneously allows to the amnesty proclamation of the late President Lincoln a retroactive effect; and thereby the rights of the Government and of the presumptive heirs of the confiscatee B. Avegno, are necessarily impaired.

ARGUMENT.

I. The record shows a preliminary actual seizure by the government as required by law, before filing the libel of confiscation; and subsequently a seizure, with *actual possession,* by the United States Marshal.

How long afterwards the Marshal *continued* in possession does not appear by the record; but his possession, actual and official, is presumed by law to have continued *until subsequent dispossession* to be affirmatively shown.

At all events, *for fifteen months after final judgment of condemnation* no one interfered with the Marshal's possession.

II. From final decree of condemnation (July 14th 1865), Avegno had forfeited all title to, interest and

concern in this property. The ownership had *then* vested in the Government and in the heirs then living of the confiscatee.

There were no "abortive proceedings in condemnation," as stated by defendants, but a final—unappealed—judgment of confiscation signed August 1st, 1865. *Its immediate effect was to vest the life-estate in the United States,—and the fee simple in the presumptive heirs of the confiscatee.* The sale of condemned property, made under judgment of confiscation, is not the consummation of the government's, or of the heirs' title.

Said the Court, *in Semmes vs. United States, 1 Otto 25:* "Properties condemned as forfeited to the United States, under the aforesaid act of Congress, *became the property of the United States from the date of the decree of condemnation. 12 Stat. 591, Sect. 7.*"

The subsequent sale of property by the Marshal so far from consummating, on the contrary divests the title of the government. It is the decree of condemnation or of forfeiture that consummates the government's title to the property condemned. This is elementary.

As to the presumptive heirs' title, how illogical it is to say that it springs from the sale made of the forfeited life-estate!

Defendants can point out no authority to the effect that the heirs' right is dependent, for completion, on the subsequent sale of the life-estate by the marshal; and the cases, which they quote, militate against the proposition, since these hold that the Marshal's sale affects and conveys no right beyond the confiscatee's

life-time. How could it be otherwise since the fee and naked property is vested in the heirs when the life-estate is forfeited to the government.

The final judgment of condemnation at once severs the property from the confiscatee, *not only as to that which is forfeited to the government, but as to that which goes to the presumptive heirs.* It is now well settled that if subsequently the confiscatee buys the property from the purchaser at Marshal's sale, he only takes the life-estate forfeited to the United States ; and if he then alienates the property, the heirs' rights are unaffected. In Wallick vs. Van Riswick, 2 Otto 213, it is pointedly remarked : "It is true that in Bigelow vs. Forest , 9 Wall. 339, and Day vs. Micou, 18 id. 156, some expressions were used indicating an opinion that what was sold under the Confiscation Acts, was a *life-estate carved out of a fee.* The language was perhaps uncautiously used. *We certainly did not intend to hold that there was any thing left in the person, whose estate had been confiscated.*"

In Pike vs. Wassell, 4 Otto 712, held that the heirs, during the life-time of the confiscatee, can stand in Court to protect their rights to the condemned property.

The judgment of condemnation, from its date, vests the condemned property in the United States and in the heirs,—the former as a tenant for life,—and the latter as absolute owners, subject to the Government's usufructuary rights for life. From that very moment—*from the judgment of condemnation,—not from the sale,*—the confiscatee is absolutely divested

of all right whatever "*As to him,*" said the Court (French vs. Wade, 12 Otto, p. 132) "*the forfeiture was complete and absolute*..... Ward, (the confiscatee) by the purchase of his own interest in the property, took the property to hold during his life, *the same as any other purchaser.* Whatever rights another could have acquired by the purchase, he got, but no more. *Another could not, after purchase, have sold and conveyed the interest of the heirs in the property; neither can he.*"

As held by United States Supreme Court in French vs. Wade & als, 102, 132, the condemnation "left in him (confiscatee) *no estate or interest* of any description, which he could convey by deed, and *no power* which he could exercise in favor of another; and the joint-resolution, passed contemporaneously with the approval of the Act (12 Stat. 627) *was intended for the benefit of the heirs exclusively*, to enable them to take the inheritance after his death. *As to him the forfeiture was complete and absolute;* but the ownership, after his death, was in no wise affected, (p. 209) *except by placing it beyond his control while living.*"— See 92 United States 202; 95 United States 711, 713.

The policy of the confiscation law lies principally in the provision, *which places the condemned property beyond the reach and control of the confiscatee while living.* After condemnation, *quoad* the property condemned he can have no status whatever in Court. Besides being divested of all title and interest, by the very policy of the law he is precluded from all power whatever to represent the condemned property in any proceeding *in rem*, or foreclosure of mortgage.

III. If there was any *virtue* in the final judgment of condemnation, rendered in due course of proceedings against Avegno's property, *he* certainly could not afterwards lay any sort of claim to it. From *July 14th 1865*, date of judgment of condemnation, as invariably held by the Federal Courts, "*this property was placed beyond his* (*Avegno's*) *control, while living.*" He might subsequently succeed as a matter of fact, in regaining possession; but that would not legally affect in the least the vested rights of either the Government or of the presumptive heirs.

It cannot be seriously contended that, under the circumstances, Avegno could stand in judgment and represent the interest either of the Government or of his presumptive heirs. Indeed, he had no quality left in the premises.

In the above quoted case of French vs. Wade & als. 102 United States, p. 132,—this matter also is passed upon: "*By the condemnation and sale Ward's estate was separated entirely from that of his heirs; and the heirs are not estopped by his warranty from asserting their title.*" In that case Ward had reacquired the property by purchase from the adjudicatee of the life-estate; and, having also the possession, he undertook to alienate the property itself. Wallace vs. Van Riswick, 92 United States, p. 202; Pike vs. Wassell, 94 United States, 711. This was held by the Court to be a legal impossibility.

IV. Defendants are so impressed with the legal difficulties in the way of their own title to the condemned property, resulting from *the want of proper parties* in the foreclosure proceedings, that they fall

back on the pact *de non alienando*, contained in Harris' mortgage act.

They contend that,—(notwithstanding absolute divestiture by condemnation, and the valid translation of title to the government and presumptive heirs of Avegno),—*nevertheless, Avegno had, still, by virtue of this pact, the exclusive right to represent this property in the proceedings for foreclosure and sale.*

In other words, the effect of the pact *de non alienando*, (*a mere private contractual stipulation* between the creditor and his debtor), is *paramount to existing laws of public policy and order*, by which government, in case of rebellion, does confiscate property, —*paramount also to existing public laws*, which, in due course of administration, enforce payment of debts *through compulsory sale of debtors' property ;—paramount also to public laws, which regulate the forced expropriation of property for public good !*

The statement of the proposition carries its own refutation. But, in principle, its fallacy is of easy demonstration.

There are, in the Louisiana Codes and Statutes, no textual provisions defining and regulating the pact *de non alienando*. Hence, when the Codes were adopted, it was at first objected that the pact itself was inconsistent with the provisions of both Codes, —of 1808 and 1825. But the Courts held otherwise, placing the matter upon its true basis, to-wit ; *a contractual stipulation, which parties are at liberty to make to the extent that the stipulation does not conflict with, or militate against existing legislation.* (2 N. S. 32 ; 1 L. 39 ; 13 L. 315 ; 14 L 133 ; 15 L. 267,

471; 19 L. 491; 2 R. 378; 4 R. 389; 6 R. 58; 9 R. 283; 10 R. 54; 2 A. 453; 3 A. 268; 4 A. 324; 8 A. 58.)

Indivivuals have no right to stipulate against *forced sales* of their property under judicial sanction; nor can they shield their property *against legal proceedings for its condemnation in cases of rebellion;* — nor can they bind Government against any *expropriation for public purposes.* In other words, *a debtor may bind himself* by contract not to alienate his property; but he cannot thereby estop or paralize the action of Courts of Justice, or of the Goverment. If the creditor with pact *de non alienando* could treat *as absolate nullities,* ignore and disregard the actual seizure and formal condemnation made at the instance of Government, or the forced sale under judicial sanction, then he, or his obligee under the pact, could, with the same propriety, at the very threshold, arrest the proceedings themselves through writs of injunction. Are defendants prepared to hold that, *quoad* a creditor with pact, the expropriation judgment, the judicial sale and decree of condemnation are *absolute nullities?* Yet, such would be the result of their pretentions.

V. However, they contend that it is held by this Court that the remedy of the mortgage creditor is to foreclose against the confiscatee, or against him and the purchaser at sale under decree of condemnation. We answer that *there is not a solitary case, (at least we know of none,) where the point was even raised.* They refer to Day vs. Micou, (18 Wallace 156). But, in that case, the point is not adverted to by the

counsel; nor does the Court pass upon it, not even *arguendo* or by *obiter dictum*.

In that case suit was brought againts the confiscatee and the purchaser at confiscation sale. *No objection was raised as to want of proper parties;* and obviously the confiscatee's presence in that suit was more ornamental than useful.

VI. The Louisiana Supreme Court erroneously held, in the *first* place: that, in the matter of U. S. vs. Seven Lots, the property of B. Avegno, the intervenor C. Morgan, appealed also from the judgment of condemnation, and *not exclusively* from the judgment dismissing his claim as a mortgage creditor;—and, in the *second* place: that the judgment dismissing Morgan's claim was not one of *rejection*, but merely in the nature of *nonsuit*.

The record shows affirmatively that Morgan, like other intervenors, introduced proof of his demand; —that the judgment of condemnation recognized four other mortgage claims, but decrees: "that the interventions of C. Morgan and B. Lorenzon, *which cannot be acknowledged*, be dismissed with costs, reserving the right to the proctors of the *rejected* claims, to make further argument. (R. p.).— Subsequently (R. p.): "This cause came up on the claims of the mortgagees *rejected*"; Lorenzon was allowed to file *additional evidence;* and as to Morgan "*the Court took further time to consider.*"

Subsequently "the judgment dismissing Morgan's intervention was maintained." Thereupon he appealed; and, in his petition, he qualifies his demand by setting forth that he is a mortgage creditor, inter-

vening for the purpose of enforcing his rights of mortgage against four certain lots of ground. And this Court, in its opinion, explains, what appeal was actually taken : " Morgan claimed a mortgage right on the proceed of sale under the judgment of the District Court".....

In order to get rid, if possible, of the judgment *rejecting* Morgan's claim as a mortgage creditor, the latter and the District Attorney, (after the rendition of the above decision in this Court), presented to the Circuit Court at New Orleans the following agreement :

" *The intervention* filed by Ch. Morgan, claiming under a mortgage executed by Avegno and wife on 3d April 1862, *is withdrawn ;* and *so much of the judgment as passes upon the effect and validity of said mortgage,* is hereby set aside and released." ..... (Rec. p.)

Thus leaving in full force the judgment of condemnation, from which *no appeal* has been taken,— but attempting to vacate a final judgment on the merits of Morgan's mortgage claim. And that too, for the obvious purpose of impairing, if possible, the rights of others, not parties to this agreement.

The Court *a quâ* construes the judgment in question as final,—not on the merits,—but simply in not acknowledging the mortgage claim.

A judgment, final on the merits, is one that dismisses and rejects the demand, or enforces it and accordingly it acknowledges, or does not acknowledge the demand.

When a case is tried, but the Court does not pass on the merits, the judgment should express that it

dismisses the claim as in case of nonsuit. For when the judgment dismisses a case, which is tried on the merits, and does not qualify the dismissal, it is one of rejection.

Now as to Morgan's intervention, the case was tried on the merits. The Court passed on the merits, and in the judgment rejected the mortgage claim itself. The record shows affirmatively that the Court *dismissed* Morgan's intervention upon *rejection of his demand*, while it sanctioned the other claimants' demands as mortgage creditors.

VII. Defendants press two objections, diametrically opposed to each other.

They argue against the plea of *res judicata* that the intervention of Morgan was *coram non judice*, an absolute nullity, by reason of utter want of jurisdiction of the Federal District Court to pass on the mortgage claims, and distribute proceeds.

And they contend that the appeal from the judgment rejecting these very mortgage claims on 4 of the 7 lots, suspended the decree of confiscation of the 7 lots!

A judgment cannot be pleaded as *res judicata*, and its absolute nullity averred at the same time. Simpson vs. Lewis, 19 A. 457. As said in Mackee vs. Carmes and al., 1 N. S. 603; "it would certainly be a magical kind of proceeding in the administration of justice, to change in an instant, and in the same suit, that which in the hands of the defendant, was to him a shield, into a weapon of destruction in those of his adversary." On the same principle, one cannot charge the absolute nullity of a proceeding,

and, in the same breath, assert its validity and legal efficiency.

But grant to defendants, for argument sake, that the Federal District Court had no jurisdiction *quoad* Morgan's intervention ; but it certainly had jurisdiction for confiscation ; and it actually condemned the property of Avegno,—the 7 lots, including the 4 in question,—by a final judgment.

Under that state of things Morgan,—conceding the absolute nullity of the decree rejecting his claim in the intervention, might proceed to foreclose his mortgage, but then only against proper parties, those having rights to the property by confiscation, but most clearly not against the confiscatee : as fully demonstrated above on the subject of the pact *de non alienando.*

But it is not correct to say that the Federal District Court was without jurisdiction to distribute the proceeds of condemned property, realized by its own officer, and held in its custody.

A mortgage creditor could not be compelled to intervene and claim payment out of the proceeds, for the plain reason that the condemnation affected only the life-estate of the confiscatee, while the mortgage extended also to the property vested in the heirs. But if the mortgage creditor chose to sue by intervention in the confiscation proceedings, he was at liberty to do so, and he is bound by the result.

Nor could the mortgage creditor by third opposition prevent the condemnation and sale of his debtor's life estate ; nor could he, afterwards, disregard and ignore the action of the Federal District

Court, although neither the condemnation nor the sale had impaired his mortgage rights. He could still follow the property and foreclose; but, in order to do so, he could not disregard the divestiture of the confiscatee, and the vested rights acquired by others.

In one word the foreclosure must be made against proper parties under pain of nullity.—So that the foreclosure made by C. Morgan, with the *formal consent of the confiscatee* B. Avegno, and *with him as sole party*, is an absolute nullity. Morgan's estate could then, as it can presently, follow this property. *contradictorily with those, in whom the mortgaged property was vested by condemnation.*

VIII. Defendants contend that, *before the appeal was finally disposed of*, Avegno was pardoned, and that restored to him the property in question.

There is a plain answer to this. The 4 lots had already been sold at the suit of Morgan vs. Avegno, and had been purchased by the former for the amount of his mortgage notes, *before the proclamation of amnesty.* How then can defendants invoke the doctrine of Knote vs. United States, p. 154, Otto V; "Where property condemned or its proceeds, *have not thus vested*, but remain under control of the Executive, or of officers subject to his orders, *or are in the custody of judicial tribunals*, the property will be restored or its proceeds *delivered to the original owner, upon his full pardon.*

The Federal District Court had been actually dispossessed of the "4 lots" nearly two years after the final decree of Condemnation. It could no more, after the subsequent proclamation of Amnesty,

restore the "4 lots" to Avegno. Indeed, Morgan had then the actual possession of the "4 lots"; and he alone,—and not the Federal District Court, —could have restored them to Avegno. Morgan invokes the pardon of Avegno,—not to reintegrate the latter in all his rights and privileges, but solely to validate and ratify his forced divesture of title, to cure the defect of his title, resulting from the illegal foreclosure of the Mortgage,—illegal by reason of want of proper parties therefor, and also of the rejection of the very Mortgage claim itself in the matter of intervention.

No such retroactive effect can be given to a pardon,—thus defeating the very purpose of Amnesty.

IX. To conclude. — The validity of the decree of condemnation conceded, it follows rigorously that the judicial sale subsequently made contradictorily with the confiscatee, Avegno *alone*, did not affect in the least the interest of the Government, nor of the presumptive heirs.

This property, while under a yearly rental of $6400, was adjudicated to Morgan for $50,000 only, —a sacrifice by public sale for cash.

In the meantime, plaintiffs were entitled to the possession of their property, and to receive the fruits and revenues since August, 1872, (Avegno's death). These are shown to be fully worth the net yearly sum of thirty-five hundred dollars,—from August 12th 1872, the date of B. Avegno's death.

Respectfully submitted,

ALBERT VOORHIES,

Attorney.

No.

Supreme Court of the United States.

HEIRS B. AVEGNO

vs.

SCHMIDT & ZIEGLER & ALS.

Answer to defendants' brief on motion to dismiss.

Defendants, in their brief, take a very superficial view of the pleadings in this case, and of the questions raised and passed upon in the State District and Supreme Courts. The "*Assignment of errors*", printed at page 5 of our original brief, recites federal questions, which were raised by plaintiff and which have been decided adversely to their pretensions.

The burden of defendants' argument is that these questions have been correctly decided by the State Courts; and that we are simply mistaken when we complain that the article of the Federal Constitution and the U. S. Statutes of 1862 relative to the condemnation of rebels' property were wrongfully interpreted and misapplied.

That may be so; but would it not be more logical to consider this matter on the merits of this cause, instead of attempting to reach it under cover of a motion to dismiss for want of jurisdiction?

Defendants argue the case on its merits in order to lay a foundation for their motion to dismiss. They hold that, under a proper construction of the quoted article of the Federal Constitution and of the Federal statute invoked, we have no such rights as we claim. They do not seem conscious of the fact that they are begging the question, and reasoning in a vicious circle.

All that is required to maintain jurisdiction in this Court, is to show that *federal questions were unsuccessfully raised.* On the merits it will be time to pronounce whether, or not, they were correctly decided.

Under sec. 709 of U. S. Rev. St., this case can be removed by writ of error upon two grounds: 1° because there is drawn in question the validity of an authority exercised under the United States, and the decision is against its validity; - 2° because a right and title is claimed under the Federal Constitution,—under a statute of the United States,—and under an authority exercised under the United States,—and the decision is adverse.

Referring the Court for particulars to our original brief we will recapitulate as follows: B. Avegno's property was regularly condemned by final,—unappealed, —decree rendered by the U. S. District Court. During the pendency of the confiscation proceedings C. Morgan, claiming to be a creditor with mortgage on some of the property seized by the Marshal, intervened with several other mortgage claimants to enforce their claims out of the proceeds of the confiscated property. There was a final judgment on the merits of these

interventions, rejecting the mortgage claims of C. Morgan and of one other claimant,—and, at the same time, recognizing the validity of the other claimants' mortgages, and ordering them to be paid out of the proceeds of three, out of seven properties under confiscation.—Morgan took a suspensive appeal from the judgment rejecting his mortgage claim as to the other four properties ;—but the Circuit Court dismissed his appeal. He then appealed to the U. S. Supreme Court; but, *in the meantime*, after the lapse of over a year, *ignoring the judgment rejecting his mortgage claim, and the pendency of his appeal in the Supreme Court*, he proceeded to foreclose the condemned mortgage claim in the Circuit Court, with the consent of the confiscatee, who accepted service and waived citation. Judgment of foreclosure was thereupon rendered. The four properties were again seized and sold, the adjudicatee being the seizing creditor himself, C. Morgan. Subsequently, the Supreme Court affirmed the decree of the Circuit Court, which had dismissed the appeal taken from the judgment of the District Court.

After the rendition of the decree of the Supreme Court, *and after the death of confiscatee*, C. Morgan, through his counsel, and the District Attorney, presented to the Circuit Court at New Orleans, the following extraordinary document:

"*The intervention* filed by Ch. Morgan, claiming under a mortgage executed by Avegno and wife on 3d April 1862, *is withdrawn ; and so much of the judgment as passes upon the effect and validity of said mortgage, is hereby set aside and released*".....

But the Circuit Court did not see fit to grant the order. Indeed, after the dismissal of the appeal from the District Court, what further jurisdiction could the Circuit Court retain ? The parties, however, were allowed simply to file the agreement as of record.

Plaintiffs, in their pleadings, claim title and rights to the confiscated property under the statute of 1862; and aver that, by the decree of confiscation, the confiscatee had instantly lost all estate or interest in, or control over the property ; that this confiscatee had no right to stand in judgment, *quoad* this property, in the foreclosure proceedings ;—that the foreclosure proceedings were void as to plaintiffs, who were not parties ; that the proceedings were based upon the additional ground that the final judgment of the Distcict Court had rejected the mortgage claim of C. Morgan on the merits ;—and that this judgment had the force of the thing adjudged.

What plaintiffs desire to test in this Court,—is the purport, effect and applicability of the confiscation article of the Constitution, and statute of 1862. 1° as regards the status of the confiscatee ;—2° as to the rights of parties having mortgage claims ;—and 3° as to the rights of the plaintiffs as heirs of confiscatee. They wish to have determined whether, as contended for by the defence, they had no rights whatever during the interval between the date of confiscation and the demise of confiscatee ;—whether they acquired no rights whatever in or to the confiscated property under federal legislation ; whether the U. S. Circuit Court could disregard the final judgment

of confiscation in the subsequent foreclosure proceedings, and recognize the confiscatee as the sole party qualified to represent the confiscated property in Court; whether there was no force or effect to be given to the judgment of the U. S. District Court rejecting this mortgage claim;—and finally, whether the judgment of condemnation was an absolute nullity by reason of the pact *de non alienando*, stipulated in Morgan's mortgage act; so that, as held by the Louisiana Supreme Court, the State Courts were at liberty to disregard this judgment absolutely, however regular and binding it might be in every respect.

There are obviously federal questions *raised* in the above propositions; and the decision has been against the validity of the judgment of confiscation,—against the legal effect of the judgment or intervention; against the title, right and privilege claimed by plaintiffs under the Federal Statute of 1862 and by virtue of confiscation proceedings.

The test on the motion to dismiss is not whether the questions were *correctly decided*,—but whether they were *raised*.

To pass upon their correctness is to entertain jurisdiction on the merits. This is fatal to the motion to dismiss.

(See our original brief, which, however, was prepared before seeing the motion to dismiss and the brief in support of the motion.)

Respectfully submitted,

ALBERT VOORHIES,

Attorney.

113-293

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JAN 10 1895
JAMES H. McKENNEY,
CLERK.

U. S. SUPREME COURT.

No. ———

WIDOW BERNARD AVEGNO, ET. AL.,

VS.

SCHMIDT & ZIEGLER.

Defendant's Brief.

HENRY C. MILLER.

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

U. S. SUPREME COURT.

No. ———

WIDOW BERNARD AVEGNO, ET. AL.,

VS.

SCHMIDT & ZIEGLER.

Defendant's Brief.

The plaintiffs sue out this Writ of Error, to review the decisions of the Supreme Court of Louisiana in this case.

There is a motion by defendants to dismiss the writ, upon the ground that this Court has no jurisdiction of the controversy. That motion will first be presented, to the consideration of the Court.

The plaintiffs are the children of Bernard Avegno, who died in 1872. They sue to recover certain real estate, in the city of New Orleans, acquired by their father, decreed to be confiscated in proceedings against him by the United States, under the Act of Congress of July 17th, 1862, (12th Statute at Large, p. 589) and which property plaintiffs claim accrued to them, at their father's death in 1872. The petition of plaintiffs, recites the confiscation proceedings and decree, but it must appear to the Court, that the basis of the plaintiffs' demand is, that they are the children of Avegno, succeeding to his property, by the law of inheritance, established by the law of the State. It is that provision of the Civil Code of Louisiana, which calls children to the succession of their father, which is the title by which plaintiffs claim to recover (see Petition Record, p. 1).

Nor do the defendant's set up any title, based on the confiscation proceedings. Those proceedings never resulted in any sale. At the time of the death of the plaintiffs' father, there was a mortgage on the property, contracted by him, in favor of Charles Morgan (Record, p. 31). That mortgage and the remedies of the creditors to enforce it, were wholly unaf-

fected by the confiscation proceedings (see 18th Wallace, p. 166; 20th Wallace, p. 114; 12th U. S. Statutes at Large, p. 589). Under a misapprehension of his rights, the mortgage creditor did intervene in the confiscation proceedings, and claim to be paid his mortgage debt, but his intervention was dismissed (Record pp. 28, 37, 38). The Court had no jurisdiction to deal with the mortgage (20th Wallace, p. 114). Thereafter, the mortgage creditor brought suit against his debtor Bernard Avegno, recovered judgment seized and sold the property, and at that sale, under the execution of the judgment, the property was purchased, and thereafter acquired from the purchaser by the defendants, Schmidt & Ziegler. The title thus acquired, the defendants set up in this suit (Record, pp. 3, 49, 54, 56, 63). That title the Supreme Court of Louisiana maintains (see Rec., pp. 70 to 73).

Now, what right or title is it, that these plaintiffs claim under the Constitution, or laws, or authority exercised under the United States that entitles them to this Writ of Error? They claimed as the children of their father, succeeding to his estate at his death. The defence was that, before the death of their father, his title had been divested by the judgment and execution sale, made to satisfy the mortgage contracted by their father (Record, p. 3). Does this issue exhibit any basis for the jurisdiction of this Court? To bring the case here, the plaintiffs must have relied in the Lower Court, on a title or right derived from the Constitution, or laws, or authority exercised under the United States, and the decision must have been against the title or right thus set up (Revised Statutes of the U. S., p. 709). The plaintiffs, it is submitted, set up as such title, right or claim—and the Writ should be dismissed. With this motion to dismiss, the case is submitted on the merits now to be presented.

The facts are:

On 3d April, 1862, Bernard Avegno executed a mortgage upon certain real estate in this city, to secure thirty-six thousand and four hundred dollars, represented by six notes, furnished by the mortgagor, and these notes with

the security of the mortgages were acquired by Charles Morgan (Record, page 31 and 35). With this mortgage in full force, the United States, in January, 1865, brought suit in the United States Circuit Court to condemn the property, under the confiscation statute of 17th July, 1862, for the offences of the owner, Bernard Avegno, the libel designating him as one of the offenders named in the act, 12th Statute at Large, (page 589; Rec., page 23, *et seq*). The Marshal in his return states, that the property was described in the confiscation proceedings. The record shows that at least from October, 1866, the property was not under any seizure. At that date, it was leased by the owner, himself, to Schmidt & Ziegler, who had possession under the lease; then, in 1867, it was seized and sold under execution, in the suit brought by Morgan to foreclose his mortgage, and the property could not have been seized and sold in the foreclosure suit, if actually under seizure in the confiscation proceedings. (See testimony of Fernandez, Rec. p. 12; Schmidt, pp. 15, 55, 56.)

At the foreclosure suit Morgan bought: the defendants purchased of him (Rec. 63), and thus defendants, first as lessees, and, thereafter, as purchaser, have been in possession since 1866. Seizure and maintenance of the seizure is assential in all proceedings in rem. The facts on this branch of the case, show if any seizure was made, as recited by the Marshal, it was abandoned.

There was a decree of confiscation by the United States District Court, on 1st August, 1865. (Rec. p. 37.) Morgan, the mortgage creditor, intervened in the confiscation suit, claiming to be paid the amount of his mortgage. (Rec. p. 28.) It is clear the Court had no jurisdiction to deal wth this mortgage, (18th Wallace, p. 156; 20th, Wallace, p. 114.) His intervention was dismissed. He took a suspensive appeal to the United States Circuit Court; from the decree of affirmance there he again took an appeal, with bond, for supersedeas to the Supreme Court of the United States, which, on the 4th of May, 1874, affirmed the decree of dismissal. (Record pages 39, 44 and 47.) Morgan's appeals seem to have been from the decree of condemnation, as well as from the decree dismissing

his intervention; at least, were so treated as pending the appeals, the seizure appears to have been abandoned as already exhibited. Avegno, himself, against whom the proceedings were directed, was pardoned under the general amnesty act of 1868. (15th Statute at Large, p. 712.) At any rate, there never was any sale under the confiscation decree; on the contrary, pending the appeals, there was the foreclosure suit of Morgan, and the sale of the property under the foreclosure decree. The confiscation proceeding practically ended with the decree of condemnation, never consummated, nor indeed capable of consummation.

Pending his appeals, Charles Morgan doubtless appreciating that he, a mortgage creditor, had no concern with the confiscation suit, but for greater caution, it seems, clinging to his appeal, in June, 1867, began his suit in the United State Circuit Court, to enforce his mortgage. Avegno was duly cited, judgment was rendered for the debt, with recognition of the mortgage, under which the property was sold and adjudicated to Charles Morgan, on the 21st Dec., 1868. Thereafter, on the 1st March, 1869, Charles Morgan sold the property to Schmidt & Zeigler, who since and now hold it as owners under that sale. (Rec. pp. 49, 56, 63.)

Bernard Avegno died in August, 1872, This suit is brought by his heirs, who assert title by the death of their father, and claim that Schmidt & Zeigler acquired no title by Morgan's deed to them. (Rec., p. 1.) The answer denies that the plaintiffs have any claim to the property, avers the legality of the adjudication of the property to Charles Morgan, under his judgment against Avegno, in the United States Circuit Court, and the validity of the sale from Morgan to defendant; the answer further avers that if any judgment can be rendered in plaintiffs' favor, which is denied, the mortgage debt of plaintiffs' ancestor must be reinstated and paid; it is charged too, that defendants have paid taxes and made improvements on the property; there is a call in warranty of the heirs of Charles Morgan, and if any judgment is recovered against the defendants, they pray for judgment against the warrantor. The warrantors answer averring the validity of defendants' title, and adopting the defences filed by defendants. Rec. pp. 1–3.

From the judgment in favor of defendants maintaining their title, the plaintiffs prosecute this writ of error. (Rec. pp. 70, 73 and 79.)

ARGUMENT.

It seems to be the theory of the plaintiffs, that the decree of confiscation of the property, disabled the mortgage creditor from suing his debtor, to foreclose the mortgage; that the decree created a title in the children to the property, and that the suit conducted by the mortgage creditor against Bernard Avegno, the debtor, and the judgment and execution sale in that suit to foreclose the mortgage, had no effect whatever to pass the title to the mortgaged property. (See petition, Rec. p. 2.) If this theory is correct, it leaves the mortgage creditor in the predicament of obliterating his mortgage debt, by attempting to enforce it, against the debtor who contracted the debt, and against the property bound for it. Prescription has long since accrued on the mortgage notes, if the foreclosure suit is treated as void. The plaintiffs' suit is, to treat the title acquired at the foreclosure suit as void, and recover the property, of course, free from the mortgage debt, with which it was encumbered at and prior to the decree of confiscation suit. The plaintiffs then, must, in order to succeed, invalidate the title opposed to them, acquired at an execution sale made to satisfy the mortgage debt of their father, of incontestable validity. This result is proposed to be reached, upon the basis, that by the confiscation proceedings, some change was wrought, by which the title to the property was by that decree vested in the children. The plaintiffs claim that the mortgage debtor, their father, lost his capacity to stand in judgment. in a suit to foreclose the mortgage, brought by the mortgage creditor, Charles Morgan, against his debtor; that the foreclosure sale under the judgment obtained in that suit passed no title, and that defendants holding under that sale, have no title whatever.

Was it not entirely competent for Charles Morgan, the mortgage creditor, after the confiscation decree, as before, to sue his debtor, Bernard Avegno, for the mortgage debt, and did not the judgment and execution sale in that suit pass the title

to the defendants? Did the confiscation decree give to the mortgage creditor a new debtor? Did it change in any manner the relation in which the creditor stood to his debtor, Bernard Avegno? Or, on the contrary, did not the confiscation decree leave unchanged and unaffected, the relation of debtor and creditor existing between Charles Morgan and Avegno, with all the rights and remedies of the creditor, against the debtor, and the mortgaged property, precisely as they stood before the confiscation decree. These questions carry their answer. Unless the confiscation decree took away Morgan's right to foreclose the mortgage, in the appropriate proceedings against the debtor, Bernard Avegno, the judgment and execution sale passed the title, as the Supreme Court of Louisiana maintained, and maintained the same view in another case recently recorded.

See that decision, Record p. 70. Shields *vs.* Shiff. 36th Louisiana Annual Reports, in manuscript.

Can it be maintained, that the confiscation statute or decree under it, vested title in the offender's children? For it is by that supposed change of title, that it is claimed in behalf of plaintiffs, that the suit of the mortgage creditor was improperly brought against the mortgage debtor. The plaintiffs claim the title had passed by the effect of the decree to his children.

The confiscation statute condemned the life interest of the owner. (12th Statutes at Large, p. 589). It had no other object. Its effect on the property, the joint resolution declared, shall extend only to the estate of the offender during natural life. (12th Stat., p. 627). During his life, the law stripped him of all interest. But this exhausts the statute. It worked no corruption of blood. It created no title to come into existence, after the death of the offender. At his death, the property was to be transmitted to those designated as his heirs by the laws of the State, in which the property was situated. Nor did the statute create any title to the property to subsist during the life of the offender, save the title to his life interest.

It would be utterly foreign to the scope of the Act, to say, save that life interest, that it established or sought to create any title

whatever. The position then, of the plaintiffs that by the confiscation decree, they became vested with title to the property, is utterly untenable. Their title, if that of their father had not been divested by the execution sale to foreclose his mortgage would have been derived from the laws of Louisiana, which, upon the death of the father, calls the children to his succession. It cannot be maintained by the plaintiff, then, that the suit of Morgan was improperly brought against his debtor, Avegno, because of any change supposed to be wrought by the confiscation statute, in creating title to the property in the children, or in giving Morgan a new debtor, or in prescribing for him, a new mode of procedure to obtain satisfaction of his mortgage debt. Any of these effects, must be deemed entirely beyond the province or competency of the confiscation statute. As to his remedies, and whom he was to sue, the confiscation statute left the mortgage creditor, precisely, where he stood before.

How could Morgan have foreclosed his mortgage, except against his debtor? Avegno was his debtor. He was alive. If the confiscation decree had been consummated by a sale, and it was not, was the mortgage creditor in such case to sue the purchaser of the interest of the offender? What could the purchaser have to do, with the mortgage debt? Was Morgan to sue Avegno's wife, or his children? At the death of the father, the law transfers the property to his heirs. But there are no heirs to the living. No one can tell who will be a man's heirs, until he dies. In other words, if the debtor is not the proper party to sue for his debt, the law has indicated no one who is to be sued. In any point of view, and whatever stage the confiscation proceedings may have reached, under the act of 1862, it must be manifest, the mortgage creditor has the right to pursue his debtor, in accordance with his contract and the law subsisting, when the contract was made, prescribing the remedy. It is still less disputable, that under the circumstances of the case, Charles Morgan's suit to foreclose his mortgage debt, was properly brought against his creditor, Bernard Avegno. The Code of Practice (Articles 176, 179, 186) points out the debtor to be cited, against whom judgment is to be given, and the property is sold under execution, thereaf-

ter issued against him. Morgan's suit, judgment, execution and execution sale were in accordance with the Code of Practice, not at all displaced, it is submitted, by the confiscation decree. There was no other mode to foreclose his mortgage.

The confiscation decree was wholly incompetent to furnish the basis for any title whatever, in another ground. The seizure of the property, essential to give jurisdiction to condemn. or to sell after condemnation, was abandoned.

See 6th and 7th Sections, Act 17th July, 1862, p. 589.
Conkling's Treatise, p. 253.
The Joseph Legunda, 10th Wheaton, p. 312, p. 312.
Pike vs. Wassel, 4th Otto, p. 712.

Misconceiving the scope of the confiscation statute, and not appreciating that no decree could interfere with the mortgage debt, or with his remedies, Morgan intervened in the confiscation proceedings, and claimed to be paid the amount of his mortgage debt from the proceeds of sale. The decree of the Court, dismissed his intervention. (Rec. p. 38.) It is claimed on the other side that this decree barred his right to seize and sell the mortgaged property. It certainly barred his right to intervene for any purpose, in a proceeding affecting only the life estate of the debtor in the property. There the decree stopped. It could adjudicate nothing more. It is too clear now, to admit of any discussion that any decree of condemnation of property, under the act of17th July, 1862, affected only the life estate of the owner. That estate, only, was subjected to condemnation and sale. When sold, the purchaser acquired the life estate, subject to all mortgages, with which the property was encumbered. The mortgages were left intact by the confiscation proceedings, if consummated, still more clear is it, that the mortgages were unimpaired if the proceedings were not consummated, as in thiscase, by any sale. The Court had no power under the act to deal with the mortgages. It could not order the mortgage debts to be paid. Therefore, no decree which the United States District Court could render in the confiscation proceedings could bar the right of Charles Morgan, as a mortgage creditor of Bernard

Avegno. In order that any judgment should have the force of *res judicata*, it is essential the Court should be clothed with jurisdiction to render the decree. If then, the jurisdiction to deal with the mortgage did not exist, it cannot be said that the judgment of the United States District Court, on the intervention of Charles Morgan, concluded his right to enforce the mortgage. Nor did the judgment do more than dismiss the intervention. The legal effect of the judgment simply was, the Court could not deal with the mortgage. The interpretation of the decree of any court, must always be limited by its jurisdiction. If the Court, in this instance, had decreed that the mortgage was void, the decree would have been a nullity, because in palpable excess of the jurisdiction of the Court. Still less is that judgment *res judicata* on the mortgage, when the Court simply dismissed the intervention.

It follows, therefore, that the Court having no jurisdiction to enforce the mortgage, by its judgment of dismissal, simply determined it had no such power. Its absence of jurisdiction in this respect is decided in the cases cited below—in all substantially, but with great distinctness in the case from 20th Wall. The judgment of dismissal left Morgan at liberty to prosecute his mortgage in the proper court, in the appropriate proceeding; in effect, it remitted him to his proper remedy. The decree affirmed nothing more.

See the Statute of 1862—already cited.
Joint Resolution—already cited.
Bigelow vs. Forrest, 18th Wall., p. 347.
Day vs. Micou, 26th Ann., p. 718.
Same case, 18th Wall., p. 156.
Claims of Macuard, 20th Wall., p. 114.
Ex parte Lange, 18th Wall., p. 177.

The mortgage deed, securing the debt of Charles Morgan contained the fact *de non alienando*. The effect of that stipulation in the mortgage act, is to enable the creditor in the suit against his debtor, to seize and sell the property, in whose hands soever it may be found.

No change of title by alienation will affect this right of the mortgage creditor. So, even if the confiscation decree had

been followed by a sale of the property under that decree, the creditor would still have the right to seize and sell. (See act of mortgage, Rec. p. 63; Louisiana Code of Practice, Art. 735; Boguille *vs.* Faille, First Louisiana Annual Report, p. 955, 1st Hennet's Digest, No. 1). With still greater reason that right existed in this case, when no sale of the property had taken place.

So the confiscation decree leaving the mortgage wholly unaffected, with the right of the mortgage creditor to sue his debtor, and enforce his debt, on the 20th June, 1867, Charles Morgan instituted his suit in the United States Circuit Court, against B. Avegno for his debt, then amounting to $38,069, recovered judgment, and seized and sold the property under his execution, and became the purchaser at the judicial sale. (Rec. pp. 49, 55, and 56.) Thereafter, the defendant acquired from him. (Rec., p. 63.) This judicial sale, it is submitted, was a complete divestiture of the title of Bernard Avegno. His children, the plaintiff's here, can have no claim to the property mortgaged to pay their father's debt, and sold under judgment and execution to pay that debt.

Day *vs.* Micon; 18th Wallace, p. 354.

Shidell's heirs *vs.* Germania Bank, 27th; Louisiana Annual Rep., p. 354.

Shields, et al *vs.* Shiff, 36th Louisiana Annual Rep., p. 645, copy of decision in manuscript filed.

See petition of Morgan; judgment, Sheriff's Returns, pp. 49, 55, 68.

Deed Sale, Morgan to Schmidt & Zeigler, p. 56.

Decision of Supreme Court, Louisiana, sustaining defendants' title, Rec., p. 70 to 73.

There was a demand in warranty, of the defendants, Schmidt & Ziegler, against their vendor, Charles Morgan, that in the event judgment should be rendered in plaintiffs' favor, against the defendants for the property, then, in that event the defendants should have judgment over against their vendor in warranty. (Rec., p. 6.) This demand is in accordance with the Louisiana Codes. See Civil Code of Louisiana Articles 2,476,

2,501, 2,506. Code Practice, Articles 378–380. This warranty extends to the restitution of the price paid by the purchaser, the revenues when the purchaser is compelled to restore them, and generally the damages caused by the eviction. Civil Code of Louisiana, Art. 2,506, 2d Henners digest of decisions of Supreme Court of Louisiana, p. 1348, Secs. 1, 3, 5. So, the defendants demand judgment, in case of eviction against Charles Morgan for the price $50,000 paid by them to him, interest thereon from date of purchase, and the further sum of $47,344.11, amount of improvements put on the property by defendants' purchase, and taxes paid by them.

Then, too, the answer prays that in the event judgment should go for plaintiffs, that the mortgage debt, under which the property was sold, should be reinstated as the first mortgage on the property (Record, p. 6; see Millandon vs. Allard, 2d Louisiana Reports, p. 551; Insurance Association vs. Lahreniche, 31st Louisiana Annual Reports, p. 841). But as to this part of the case, *i. e.*, the issue between the defendants and their vendor, it will not be material, unless the plaintiffs succeed in their suit against defendants, and in that contingency, the case will perhaps have to be remanded, or if determined, the defendants ask for judgment on their demand in warranty for the amount already stated and shown by the Record.

But it is confidently believed that the Court can have no occasion to look into the issue between plaintiffs and the warrantor; but will either dismiss the writ for want of jurisdiction or affirm the judgment of the Supreme Court, and the defendants respectfully ask that the judgment be affirmed.

Respectfully Submitted,

HENRY C. MILLER,

Counsel for Defendants.

113-293

Office Supreme Court U. S.
FILED.
JAN 10 1885
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 946.

HEIRS OF AVEGNO,

versus

SCHMIDT & ZIEGLER, AND
ESTATE OF CHAS MORGAN, CALLED IN WARRANTY.

BRIEF FOR WARRANTOR.

HENRY J. LEOVY.
Of Counsel for Morgan Estate.

Thomason, Printer, 36 Natchez Street, N. O.

SUPREME COURT OF THE UNITED STATES.

No. 946.

HEIRS OF AVEGNO,

versus

SCHMIDT & ZIEGLER, AND

ESTATE OF CHAS MORGAN, CALLED IN WARRANTY.

BRIEF FOR WARRANTOR.

STATEMENT OF FACTS.

1. In April, 1862, Bernard Avegno granted a mortgage for $36,400, on his four lots in New Orleans; this debt was represented by promissory notes, drawn and paraphed in the manner usual in Louisiana. Charles Morgan became the owner of these notes and the mortgage securing their payment.

2. In January, 1865, proceedings were instituted in the United States District Court against Avegno, under the Act of Congress of July, 1862 (12 Statutes at Large, p. 589), to procure the condemnation and confiscation of the property mortgaged to Charles Morgan. Rec. p. 23. We contend that there was no seizure of the property prior to the filing of the libel, as required by the confiscation act, under which the proceedings were instituted. Nor was there any *actual* seizure by the marshal after the filing of the libel. The marshal was never in possession of the property. Avegno leased it to Schmidt & Ziegler in October, 1866,

and they held it as lessees, until they bought the property. (Record, pp. 11, 12, 14, 21.)

3. On the 13th April, 1865, Charles Morgan intervened, and prayed that the four lots on which he held his mortgage be not condemned; that in case the property be condemned and sold, that his claim for $36,400, and interest, be recognized and allowed. (Rec. p. 28). To this no answer appears to have been filed, the claim, so far as the record shows, does not appear to have been denied; but, in the trial between the United States and Avegno, he was heard though counsel, and his claim was dismissed, and the Court, in July, 1865, condemned the property, and ordered it to be sold. The Court evidently decided, as the U. S. Supreme Court has frequently done, that Morgan could not intervene, that he had his remedy by direct suit, and that the sale should take place of the rights of Avegno only. The reasons of the Court were delivered *orally*. (Rec. pp. 37, 39.) From the decree of condemnation, Morgan appealed to the Circuit Court, and the judgment and sale were *suspended*.

4. In June, 1867, (the case not then having been tried in the U. S. Circuit Court) Charles Morgan proceeded by direct suit in the U. S Circuit Court against Avegno, to foreclose his mortgage. He was served personally; *the property was then in his possession*, through Schmidt & Ziegler, his lessees. Judgment was rendered against him for the amount claimed, and interest, and the property was sold in December, 1868, under the judgment, and Charles Morgan became the purchaser for $50,000. (Rec. pp. 55, 56.) That this was its full value is shown by the fact that Avegno bought it in 1860, for $37,000, and it was valued by the appraisers appointed by the court in 1865, at $25,000. (Rec. p. 41.) In March, 1869, Mr. Morgan sold to Schmidt & Ziegler.

5. In December, (25th) 1865, the President's pardon was proclaimed. This restored to all parties their property not actually condemned and sold, and disposed of the claim of the United

States. Morgan's appeal, as we have seen, had suspended the condemnation and order of sale of the U. S. District Court.

6. In March, 1872, the U. S. District Attorney moved in the U. S. Circuit Court, that the appeal in that Court be dismissed, on the ground that it had been brought up by writ of error in place of appeal. (Rec. p. 44). On this point, and *this only*, the appeal was dismissed. From this decision a suspensive appeal was taken to the U. S. Supreme Court. (Rec. pp. 45, 46). That Court (the Judges being equally divided) affirmed the decision of the lower court, (in May, 1874,) on the sole ground that the case should have been brought up by appeal, (as in admiralty cases) and not by writ of error. (Rec. p. 47).

All claim of the United States, as against Morgan, *was dismissed* 12th May, 1875. (Rec. p. 48).

7. Bernard Avegno died August 12th, 1872. The judgment against him had been suspended up to the time of his death. The decision of the U. S. Supreme Court dismissing the appeal, was in May, 1874—nearly two years after his death.

8. The testimony of Fernandez, p. 12, and Schmidt, p. 14, and Ruter, p. 57, shows, conclusively, that Avegno was never divested of possession; that the only notification of seizure to Schmidt & Ziegler, the tenants, was from the marshal, in 1867, in the suit of Morgan vs. Avegno. It further shows that the buildings were nearly worthless; that they rebuilt them at a heavy expense; that taxes have been paid and repairs made. It is also shown that Avegno's debt of $36,400, and interest, to 1867, secured by mortgage on the property, has been paid, and that the rent since (claimed by plaintiffs) could not exceed the amount of interest on $36,400, for which the plaintiffs would be liable, if they could recover.

9. Plaintiff says Morgan's claim was *rejected on its merits*. We deny that there is a single word to show on what ground the decision was rendered. There was no denial of the merits.

Avegno was not a defendant as against Morgan in that suit, and Morgan's claim was not denied by Avegno. The opinion of the District Judge was *orally* delivered. (Rec. pp. 37, 39). There is no report of what he said. The only decision the Court *could* render was one of dismissal, in the nature of a non-suit, as it has been frequently decided that a creditor could not intervene in a suit to condemn and confiscate property; that he could have no interest in the suit, as the sole thing to be condemned was the interest of the confiscatee. It was because it was a simple dismissal of Morgan's claim, as in case of non-suit, that he instituted the direct action against Avegno in the U. S. Circuit Court in 1867. The Court had no power whatever to decide the case on the merits, as between a creditor and confiscatee.

10. Avegno never ceased to have an interest in this property. The judgment of condemnation was suspended by appeal; before the appeal was disposed of in the Circuit Court (in March, 1872), Avegno had been pardoned (by the proclamation of the President, in December, 1868), and again, before the final disposition of the case in the United States Supreme Court (in 1874), Mr. Avegno's death occurred, (in August, 1872.)

Law Points.

I.

Under the Confiscation Act of Congres, of July, 1862, the property sought to be confiscated must be seized *prior* to proceedings to condemn, before a libel can be filed. It is absolutely necessary *to confer jurisdiction on the Court.* Pelham vs. Rose, 9 Wall. p. 106; Miller vs. U. S., 11 Wall. p. 294; 11 Wall. 344; Pike vs. Nossel, 94 U. S. 172.

II.

There must also be a seizure and keeping of possession after the filing of the libel. To constitute a valid seizure, the marshal

must have " *the actual, visible possession* and control of the thing seized, and must *exclude the possession* and dominion of the owner." The Segunda, 10 Wheaton, 312; Conkling's U. S. Courts, (4 Ed. p. 457.) And where the jurisdiction of the court depends upon the seizure, possession must be *continuously maintained during* the pendency of this proceeding. *Ibid*, and Adler vs. Roth, 11 Rep. 524.

III.

The court had no jurisdiction further than to seize and sell the confiscatee's interest in the property. And the judgment is to have only this effect, though the language goes further. Bigelow vs. Forrest, 9 Wall. 350; Day vs. Micou, 18 Wall. 160; *Ex parte* Lange, 18 Wall. 177; Marcuard Claims, 20 Wall. 115; Act of Congress, 17th July, 12 Stats. at Large, p. 591.

IV.

Appeal was suspended. Yeaton vs. U. S., 5 Cranch, p. 281; 1st Blatchford C. C. R. p. 1.

V.

All rights were restored by the President's proclamation. The pardon arrested and disposed of the confiscation proceedings. In this case the property had not been sold when the pardon was proclaimed, which was on the 25th December, 1868. The case was then pending in the U. S. Circuit Court on a suspensive appeal. Even had there been no appeal, and the property had been sold, and the proceeds in the custody of the court, Avegno would have been entitled to the proceeds as an effect of the pardon. Carlisle vs. The U. S., 16 Wall. 147; Osborn vs. The U. S., 91 U. S. S. C., p. 474; Knote vs. The U. S., 95 U. S. S. C., p. 152.

VI.

The debtor is the proper, and only party, against whom proceedings can be instituted. This was the course pursued in the Micou case, 18 Wall. p. 160; 26 La. An. p. 720; 36 La. An. p. 644,

(decided in 1884). In this case, when suit was instituted, Avegno was the actual debtor, he was in possession, and an appeal had suspended judgment against him. But had there been judgment against him, execution and sale, Morgan could have proceeded as if no sale had taken place. 18 Wall. p. 160.

The act of mortgage contains the pact *de non alienando*, which *authorizes* the mortgagee to foreclose, by proceeding contradictorily *with the mortgagor alone, whether the alienation has been voluntary or by process of law.* It is an agreement binding on the heirs, and they cannot contest it. 13 La. An. 241; 11 La. An. 383; 8 La. An. 58; 4 La. An. 324; 3 La. An. 268; 2 La. An. 453; 10 La. R. 54; 9 La. R. 283; 6 La. R. 58; 4 La. R. 389; 2 La. R. 378; 19 L. 491; 15 L. 267; Id. 571; 14 L. 133; 13 L. 315; 1 L. 39; 2 La. N. S. 32.

No question of public policy intervened, as alleged by plaintiff, because confiscation proceedings are directed against the owners of the property, and not against the mortgage creditors. Their rights are expressly reserved.

CLAIM AND DEFENSE IN THE PLEADINGS.

(*a*) Mrs. Avegno, widow of Bernard Avegno, brings this suit to recover the property referred to. She alleges that the title thereto was not regularly divested from Bernard Avegno, and that it is now in his children.

(*b*) The estate of Charles Morgan, called in warranty, files for answer:

1st. That, even if the confiscation suit against Bernard Avegno was regularly instituted and conducted, the property was validly sold in Morgan's suit for foreclosure, so as to confer the absolute and complete title to Morgan.

2d. That, in point of fact, the confiscation suit was a mere

nullity—vitiated by fatal irregularities, so that nothing done therein affected in any wise Avegno's title or rights.

3d. That all claim on the part of the United States was waived and abandoned, by the proclamation of pardon, 25th December, 1868.

ARGUMENT.

In discussing the first ground of defense, we beg to make a brief reference to well settled principles in regard to the powers of courts, as limited by jurisdictional considerations.

The action of a court must be confined to the particular cases, controversies and parties over which the constitution and laws have authorized it to act; and proceeding without the limits prescribed, is *coram non judice*, and its action *a nullity*. *Rhode Island vs. Mass., 12 Pet. at p. 720.*

When the court exercises its judicial powers with respect to matters to which its jurisdiction does not extend, such action is *utterly null and void*, and ineffectual to change in any manner the legal rights or relations at which it is aimed.

And it should be remarked that courts of general jurisdiction, may, as to particular subjects, be strictly courts of limited jurisdiction. This happens where a court of general jurisdiction exercises an extraordinary power under a special statute prescribing the occasion and mode of its exercise. *Drake on Attachment, Chap. V.*

Applying the above stated principles to the facts of the present case, we have to consider:

I.

A. *Nature of the Jurisdiction of U. S. District Courts in Confiscation Suits under the Act of July 17th, 1862,* (12 Stats. at Large, p. 589.)

The jurisdiction of the U. S. District Courts, in confiscation proceedings, is derived from and determined by the provisions of the Act of Congress of *July 17th, 1862.* That Act designates:

1st. The persons whose property was liable to confiscation;

2d. The steps to be taken in the initiation of the confiscation proceedings, and the general course of procedure therein;

3d. The judgment which could be rendered; *i. e.*, the kind and quantum of judicial power which the court was empowered to exercise.

It is apparent from this analysis, that the U. S. District Courts were, in confiscation suits, courts of limited and peculiar jurisdiction. Their judicial power derived from the confiscation act was exercisable only against rebels or insurgents; an unusual mode of procedure was prescribed to bring it in action; and it was limited in extent and distinct in character.

The conclusions have been confirmed and elucidated in the following cases:

Bigelow vs. Forrest, 9 Wall. 350–1. HELD: The court had no jurisdiction further than to seize and sell the confiscatee's life interest in the property condemned. And the judgment is to have only this effect, *although the wording is such, that, had the court's jurisdiction been more extended, the judgment would have availed to divest the fee-simple.*

Day vs. Micou, 18 Wall. 160–1. Affirms Bigelow vs. Forrest, and adds, that "*nothing more* (than authority to seize and sell the confiscatee's life interest) was within the jurisdiction, or judicial power, of the District Court.

Ex parte Lange, 18 Wall. 177–8. In this case the court incidentally consider the jurisdiction exercised by the District Courts in confiscation proceedings. It is remarked, as a fact neither questioned nor questionable, that that jurisdiction is confined to the power to render a particular judgment, as to a particular subject. And a judgment, in such proceedings, *which should purport to decide upon other matters than the single proper subject of the court's jurisdiction, would be absolutely void as to such other matters.*

Claims of Marcuard, 20 Wall. 115. Actually applying the prin-

ciples announced in the case last cited, it was held, in the case of Marcuard, that the District Courts *had no jurisdiction to render any judgment whatever respecting claims of creditors of the confiscatee, having liens upon the confiscated property.* Such creditors could not be permitted to intervene in the confiscation suit, either to enforce their rights against the property itself *or to claim its proceeds.* Their interventions *should simply be dismissed.* But their rights against the confiscated property were not cut off nor affected.

The conclusion, then, that is both deducible from the Act itself and is established by the decisions thereunder, is that the U. S. District Courts, in confiscation proceedings, were of limited jurisdiction and were strictly confined to the exercise of the one power conferred upon them by the Act, viz: the condemnation and forfeiture of the confiscatee's life interest in the property. *They were without authority to admit into the proceedings, interventions of creditors of the confiscatee,* and any attempts to exercise jurisdiction over the matters or rights asserted in such interventions were mere and complete nullities. These, we are to presume, were the reasons why Morgan's claim was simply dismissed by the U. S. District Court, in 1865, when he intervened in the suit between the United States and Avegno.

B. *Effect of the Sale, in a Confiscation Suit, on the Rights and Remedies of Creditors having a Lien on the property so sold.*

Day vs. Micou, 18 Wall. 156; Claims of Marcuard, 20 Wall. 114. These cases decide that claims of lien creditors are not affected by a confiscation sale. Still less would they be impaired by a mere *judgment not followed by a sale.* In the last named case it is said, "the sale under the judgment of condemnation in no degree distubed their liens." In Day vs. Micou: "The interests of others are not cut off or affected." * * * "Their interests did not pass to the purchaser at the sale, and they

remain *unaffected by the decree of condemnation and the sale thereunder.*"

In the case of Day vs. Micou, the mortgagee of the confiscated property, which had been sold under the decree of condemnation, foreclosed *as against the confiscatee and purchaser.* The foreclosure was held valid. The purchaser was brought in as third possessor.

Let us apply these principles to the facts of the case now under discussion.

Confiscation proceedings were instituted in January, 1865, against certain lots of ground, the property of Bernard Avegno. Charles Morgan had a mortgage on four of these lots. He attempted to intervene in the confiscation suit, in order to protect his rights. His intervention was dismissed. This was all the court could legally do with it As Morgan's mortgage rights would not have been affected if he had not even attempted to intervene, so they were not impaired in any wise by an unsuccessful attempt to intervene. Whether he wholly disregarded the confiscation proceedings, or whether he illegally and unsuccessfully endeavored to take a part therein, in either case he was at liberty to institute proper proceedings, outside of and disconnected from the confiscation suit, in order to foreclose his mortgage. This he did in the suit for foreclosure in the U. S. Circuit Court in 1867. That suit was regularly conducted, and contradictorily with those parties whom the Supreme Court of the United States have expressly, in the case of Day vs. Micou, recognized as the proper parties to proceed against. Avegno was then *in* possession of the *property*, through his tenants, Schmidt & Ziegler, and the *judgment* against him had been suspended. In Day vs. Micou, the decree of condemnation had been followed up by a sale thereunder. The mortgagee proceeded against the purchaser at this sale and against *the confiscatee.* In the present case, there never was a sale of the mortgaged lots under the decree of condemnation. Mr. Avegno

retained the undisturbed, unquestioned possession and enjoyment of the mortgaged lots. He did not pretend to hold the lots in virtue of anything done in the confiscation suit; he simply continued to hold them just as he would have done if that suit had never been instituted. The mortgage debt became due and was not paid. The mortgagee, whose rights were not in any case affected by confiscation proceedings, became then entitled to foreclose his mortgage. There was but one person against whom the suit of foreclosure could possibly be instituted and carried on. That one person was Mr. Avegno, *the debtor*, who occupied and enjoyed the property as owner, and whose right to such possession was not disputed by any one else. According to the principle in Day vs. Micou, it is sufficient to proceed against the actual possessor and the confiscatee. When, therefore, the confiscatee remains in actual and undisputed possession, it is sufficient to proceed against him, particularly as against this property, no final decree had been rendered, judgment having been suspended by appeal. There was no one else, in such case, who could be joined in the defense. See decision in the case of the La. Supreme Court, 35 An. p. 585.

There can then be no doubt, under the fixed jurisprudence, that, even admitting the confiscation proceedings to have been regularly instituted, and every step therein taken to have been in conformity with law, Mr Morgan had still the right to foreclose his mortgage, and that he did foreclose in a regular and valid manner. This foreclosure divested the entire title to the lots, and transferred it to the purchaser at the sale thereby had. This purchaser happened to be Mr. Morgan himself, who thus acquired the full, complete ownership of the lots.

Besides, the act of mortgage contained the pact *de non alienando*, which authorized this proceeding, and to which we shall again refer.

II.

We proceed to consider the next ground of defense, viz:

The total and fatal irregularity and invalidity, the absolute nullity of the confiscation proceedings.

Wherever the record of a court of *limited* jurisdiction is offered as the evidence or basis of a right, the record must show not only that the court *exercised*, but also that it *had jurisdiction.* That is, it must appear in the record that the cause decided was one of those which the court had power to decide, and that the court's action conformed to the prescribed rules of procedure, according to which, in the particular case, the law required the court to exercise or even acquire the jurisdiction conferred. If the record fail to show either of these requisites, it is utterly worthless. If the record shows *prima facie* a proper cause, and regular procedure in compliance with law, it is good until and unless contradicted by proof that the jurisdictional averments are false.

Now, in confiscation proceedings, the court's jurisdiction was limited and strictly conditioned. Neither the court, nor any of its officers, had authority to *institute* confiscation proceedings against any one, The initiation of such suits was left in every instance, by the Act of July, 1862, (12 Statutes at Large, p. 589) to the discretion of the President of the United States. The law was political in its object, and it was, therefore, wise to permit its enforcement to be controlled by political considerations. Accordingly, until the President directed the application of the law against a particular individual—no matter how notorious a rebel he might be—the court could take no action whatever against him. The President was required to indicate his will in a prescribed manner, and he could not validly indicate it in any other. He must cause the alleged rebel's property *to be seized*, and "*after such seizure*," the District Attorney filed a libel against the property and directed the *marshal of the court to seize it* and bring it within the control of the court. As the validity of every step in

the proceedings, from the filing of the libel to the judgment, depended on the fact of a previous seizure by order of the President, it is clear that the first and most essential jurisdictional fact which the record in a confiscation suit should show, is the making of such a seizure. All this has been repeatedly and emphatically recognized by the Supreme Court of the United States, as will appear by reference to the cases below cited:

Pelham vs. Rose, 9 Wall. at p. 106. The absolute necessity of a *previous seizure* by the President's *order, to confer jurisdiction* on the court, is, in this case, strongly and clearly insisted upon.

Miller vs. United States, 11 Wall. at p. 294. "*True, a seizure under* ORDER OF *the President* was necessary *to warrant the institution* of judicial proceedings for confiscation, and it may be, therefore, a proper inquiry whether what the marshal did under such order amounted to a seizure." At p. 296.

Tyler vs. Defrees, 11 Wall. 344. This case turns solely on the question collaterally raised, whether the previous seizure, by the President's order, had actually been made. The President's seizure had been made by the marshal, *whose return was in the record, filed before* the filing of the libel. It does not seem to have been doubted that the proceedings would have been absolute nullities had this seizure not been made, or not been shown.

Now, in the record of the confiscation proceedings against Bernard Avegno, there is *absolutely nothing* to show that, *previous to the filing of the libel*, the property had been seized by the President's order. It is true the libel itself *avers* such previous seizure, and even that does not allege seizure by the proper officer, the marshal, nor, by the authority of the President; but the allegation, if properly made, is not enough; the record should show it by the *return of the officer* who is alleged to have made the seizure. The record must contain distinct, legal *proof* of the verity of every allegation on the truth of which *jurisdiction* of the court depends. The record is destitute of any vestige of proof of a fact,

the proof of which is indispensable to jurisdiction. The so-called record is then worthless—a mere nullity.

We might safely rest the case here, but there happens to be a still further irregularity, which alone would absolutely nullify the confiscation proceedings. This irregularity does not, however, like that just noticed, appear from the record, but is shown by extrinsic evidence. It consisted in the failure of the marshal to make any seizure of the property after the filing of the libel.

As the marshal's return states positively that the property was seized after the filing of the libel, we must, at the threshold of the discussion of this point, establish our right to deny and disprove the verity of this return. We must further show what is necessary to constitute a valid seizure, where jurisdiction is dependent on a seizure.

The law is perfectly clear on both these points. In *Thompson vs. Whitman, 18 Wall. 466, et seq.*, it is said: "The jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. But if it is once conceded that the *validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction*, it is not perceived how *any allegation contained in the record itself*, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry." And the court conclude that it is permissible to do precisely what we propose to do in this case —to contradict the marshal's return as to seizure, prove it to be untrue, and to show that the court was without jurisdiction to render the judgment relied on. This decision is supported by a

large number of authorities, quoted at length, from both Federal and State courts.

Next, as to what constitutes a valid seizure. To constitute such a seizure as will enable a court to acquire and maintain jurisdiction as regards the things seized, the marshal must have the "*actual, visible possession and control of the thing seized, and must exclude the possession and dominion of the owner.*" The Josepha Segunda, 10 Wheat. 312. Conkling's Treatise on the U. S. Courts, (4th Ed.) p. 457. And where the court's jurisdiction to render a judgment is dependent upon the seizure, not only must it have been legally made in the beginning, but it must, further, have been *actually and continuously maintained* during the pendency of the proceedings. *Ibid. Adler vs. Roth, 11 Rep. 524.*

It has been shown, the marshal's return to the contrary notwithstanding, that the property condemned in the confiscation suit never was actually seized by the marshal. At the time that suit was instituted by Morgan, the property in question was still held by tenants, for Avegno. They never acknowledged, nor were required to acknowledge, the marshal's control over the premises. They rented the property from Avegno, and paid him the rent. Under what conceivable theory, then, can it be maintained that there was a seizure of the property? Neither did the marshal have the "*actual, visible possession and control,*" nor was Avegno's "*possession and dominion excluded.*" Accordingly, the alleged seizure was never properly made, nor in any manner maintained. Now, as the jurisdiction of the court, in confiscation proceedings, absolutely depended on the fact of a sufficient and valid seizure, the court was totally without authority to render any judgment in the proceedings against Avegno, where such a seizure had not been made. The record of these proceedings is a mere nullity. 9 Wall. 102–103; 11 Wall. 294; Id. 328.

The plaintiff's demand in the present suit must be rejected, if the Record of the confiscation suit against Bernard Avegno is

invalid and null. We have shown that it is so for either of two independent reasons:

First. Because the Record does not contain even *prima facie proof* as to the first fact essential to jurisdiction.

Second. Because of the absolute and unqualified falsity of the recital in the Record as to the second jurisdictional fact.

The defenses thus far presented are derived exclusively from the Act of Congress itself, and from the jurisprudence thereunder. These are confirmed by others, derived in part from the jurisprudence of Louisiana.

The act of mortgage which secured the notes held by Charles Morgan, contained the pact *de non alienando*, or stipulation that the mortgagor would not alienate nor encumber the mortgaged property so as to affect the rights or remedies of the mortgagee. The Louisiana courts have, in numerous cases, held this stipulation to be valid, and that its effect is to authorize the mortgagee to foreclose by proceeding contradictorily with the mortgagor alone, even when he has alienated and ceased either to own or possess the property, and the exercise of this right *affected no question of public policy;* because it did not interfere with the confiscation and sale of such rights as Avegno possessed. And this rule applies as well where the mortgagor *has been compelled, by process of law, to alienate,* as where the alienation is his voluntary act. 13 La. An. 241; 11 La. An. 383; 8 La An. 58; 4 La. An. 324; 3 La. An. 268; 2 La. An. 453; 10 La. R. 54; 9 La. R. 283; 6 La. R 58; 4 La. R. 389; 2 La. R. 378; 19 L. 491; 15 L. 267; Id. 471; 14 L. 133; 13 L. 315; 1 L. 39; 2 La. N. S. 32.

On this point, the language of the Louisiana District Judge is so forcible, that we adopt it as conclusive. "At the time Avegno made the pact *de non alienando*, he was absolute master of the property. He had a right to make the pact, and it *was binding upon his heirs.* It created a *vinculum juris*, which is so inextricably woven with the cord, which unites the plaintiffs to their ancestor,

that they can only hold the titles by their own obligation in the former. *So far as plaintiffs are concerned*, Bernard Avegno was on the 25th June, 1867, the absolute owner of the property in dispute, and so remained until his death, "*in spite of the confiscation proceedings.*" "The mortgage granted prior to that date (that of confiscation proceedings) was valid, together with the accompanying stipulation not to sell, the titles being entirely or partially nugatory quoad the Government, and quoad the courts, but vital and enduring as to *himself and his heirs* forever." See also decision in this case of the Supreme Court of La., 35 An. 585.

We have shown that it has been settled by the United States Supreme Court, particularly in the cases of *Day vs. Micou* and *The Claims of Marcuard*, that the condemnation and sale of property under the confiscation act neither *cut off nor affected liens* binding such property. The liens existing on the property at the time of confiscation remained attached thereto, with all their incidents and remedies, whether given by law or contract. Then, notwithstanding any confiscation decree, and, whether it was valid or not, Morgan was entitled to foreclose his mortgage by proceeding against Avegno, just as he would have done if the Government had not sued.

III.

We have seen, that in the suit of the United States against Avegno, in the District Court, Morgan intervened and prayed, among other things, that the property *be not condemned;* that his prayer was disregarded, and that from this judgment Morgan appealed, suspensively, first to the Circuit Court, then later to the Supreme Court; that the sale was stayed; nothing was ever done under the judgment; indeed, we have seen, that Avegno even remained in possession of the property, and collected his rents until the sale, in the suit of Charles Morgan against Avegno.

We contend that, under these circumstances, the pardon by the President, under his proclamation of December 25th, 1868, terminated all proceedings for condemnation of the property of Avegno and restored to him all his rights. Indeed, had there been no suspensive appeal, or had the Government even sold the property, and the proceeds remained in the custody of the court, the proceeds would have been restored to him.

The President's proclamation of December 25th, 1868, granted unconditionally, a full pardon and amnesty to persons who "directly or indirectly participated in the late insurrection," "with restoration of all rights, privileges and immunities."

It was a public act of which all courts are bound to take notice. 13 Wall. 154.

In the case of Carlisle vs. the United States, the plaintiff claimed the *proceeds* of the property sold. The U. S. Supreme Court, after reviewing the decisions on the subject, say, "after these repeated adjudications, it must be regarded *as settled* in this Court, that the pardon of the President, whether granted by special letters or general proclamation, relieves claimants of the *proceeds* of captured and abandoned property, from the *conseqences of participation in the rebellion*," etc. 16 Wall. 147.

Later, the Supreme Court adopted the decision of the Circuit Court, which declared that "the effect of the pardon was to restore to its recipient *all rights of property lost* by the offense pardoned, unless the property had, by judicial process, become vested in other persons." 91 U. S. S. C. p. 474.

And finally, in the last case, that of Knote vs. the United States, (95 U. S. S. C. p. 152) the court declared, after referring to several cases, "the effects of a pardon upon the condition and rights of its recipients, have been the subject of frequent consideration by this Court, and principles have been settled which will

solve the question presented for our determination in the case at bar. A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable, and *within the control of the pardoning power, or officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him* all his civil rights." The Court then go on to say, that if the proceeds have been paid into the U. S. Treasury, they are beyond the reach of the President, and an Act of Congress becomes necessary; and then the Court adds: "Where, however, *property condemned*, or its proceeds have not thus vested, but remain under control of the Executive, or of its officers, subject to his orders, or are in the custody *of the judicial officers, the property will be restored*, or its proceeds delivered to the original owner, upon his full pardon." We presume it is unnecessary to dwell longer on this point.

IV.

We think we have shown that the plaintiffs cannot recover, and, therefore, it is unnecessary to discuss other points. We beg to state, however, that plaintiffs in their claim do not make allowance for the amount paid by Mr. Morgan, by which the mortgage on this property was released. In case of recovery by them, the mortgage would have to be reinstated. As alleged by defendants, in their brief, plaintiffs could only recover subject to the mortgage debt to Morgan of $36,400, and 8% interest, *to this date.* Millaudon vs. Allard, 2 La. 547; see, also, 10 La. An. 272; 30 La. An. 1307; 31 La. An. 839.

So, also, they would have to pay for improvements made on this property. Schmidt says he was compelled to pull down the old buildings *and build new ones.* They would also be compelled to refund the money paid for taxes.

But we think the Court will not be required to investigate these points.

Respectfully submitted,

HENRY J. LEOVY.

Of Counsel for Morgan Estate.